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[Process of Archibald Macduff of Ballinloan
" against Sir John Stewart of Grandtully, Baronet,
regarding the latter's right to the lands of
Ballachachan]

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July 27. 1768.

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MEMORIAL

F O R

ARCHIBALD MACDUFF of Ballinloan,

A G A I N S T

Sir John Stewart of Grandtully, Baronet,

IN 1628, Sir William Stewart of Grandtully granted a feu-right to John Macduff of Ballinloan, of the town and lands of Ballachlachan, with the usual clauses of grafings, shealings, muirs, mosses, parts, pendicles and pertinents, &c. as the same were occupied and possessed by the tenants and possessors thereof.

These lands were originally part of the barony of Strathbran, the tenants and possessors of that barony having their corn-lands or head-rooms in the lower grounds upon the river-side, and without their head-dikes a large commony of wild uncultivated muirish ground, common to that whole barony, insomuch that there is not a single farm of that barony, whether still remaining with the family of Grandtully; or feued out, that does not possess this muir in common; and accordingly it stands clearly in proof, and will not be denied, that the tenants of Ballachlachan have immemorially possessed this commony as their joint property with the other feuers and tenants of the barony of Strathbran, by every act of possession that the subject was capable of, insomuch that it is

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presumed,

presumed, that this fact, which was admitted upon the hearing of the cause, will not now be denied.

In the heart of this commonty, and close by the burn of of Riebeg, there is a spot of ground of about twenty-five acres, reputed one of the best grafings in the whole commonty; and it was apparently on this account that this was most commonly used as a shealing-place by those who had right of commonty upon this muir.

In 1725, Sir John Stewart of Grandtully, purposing no doubt to appropriate this part of the commonty to himself, begun some improvements upon it; against which an instrument of protest was taken, and civil interruption thereby used in 1726. But as the respondent was not in condition to engage in a law-suit with so potent an adversary, though he continued constantly to grumble on account of this incroachment, and made frequent complaints thereof to his friend Mr Menzies of Culdares, he was by him dissuaded from engaging in a law-suit, in hopes that some other method might be fallen upon to put a stop to these incroachments: and thus it happened, by offputs and delays, from one time to another, that forty years had near elapsed from the instrument of protest 1726 till the commencement of this process; but as the pursuer happened to be under age for some part of that time, the prescription was thereby staid.

The scope of the action was for declaring the pursuer's right to those parts of the commonty called *Riebeg* and *Blairnabuiag*, or at least a common property therein; which being disputed by Sir John, a condescendence was given in to the Lord Ordinary, on the pursuer's part, and answers made thereto for the defender; upon advising of which, his Lordship allowed a proof before answer; which being reported, a state thereof prepared, and counsel heard thereon, your
July 14. 1768. Lordships were, of this date, pleased to pronounce the following interlocutor.

"The

“ The Lords having advised the state of the process, testimonies of the witnesses adduced, writs produced, and heard parties procurators thereon, find, That the defender is intitled to continue in the exclusive possession of the ground called *Riebeg*, as now inclosed and improven; and that in case any action is brought for dividing the same, and the grounds adjacent, as a common, he shall be intitled to get the said farm of *Riebeg* adjudged to him as part of his share, computing its value at what it may have been worth before any improvement or inclosing; reserving always the question, Whether, upon such division, the pursuer is intitled to a share, as having a right of common property, or only as having a right of servitude therein? and ordain memorials *hinc inde* to be given in on this question,” &c.

Upon this state of the case, as the single point that remains to be determined is, Whether the pursuer, in right of his property-lands of Ballachlathan, has a right of common property in the aforesaid common grounds, or only a servitude of pasturage, feuel, feal, and divot? the pursuer proposes to give your Lordships the trouble of very little argument upon it; because, however doubtful it may have been in former times, it seems now to be settled by a train of decisions, some of them very recent.

That the pursuer, and his predecessors, and their tenants, possessors of the town and lands of Ballachlathan, have immemorially possessed these grounds in common with the tenants and possessors of the other parts of the barony of Strathbran, is an undisputed fact, and stands clearly in proof by a cloud of witnesses, contradicted by none; which therefore renders it unnecessary to restate the proof of that fact.

The defender was indeed pleased to observe, That the only possession which the tenants of these lands appear to have had in this common, were acts merely superficial, such as pasturage, and casting; that such acts of possession are more properly

perly ascribable to rights of servitude than of property ; which therefore *in dubio* ought rather to be construed the possession of a servitude, than of a proprietor ; more especially considering, that there are words in the pursuer's original rights, which are more properly descriptive of a servitude only, such as shealings, grafings, muirs, mosses, &c.

But there is nothing in this peculiar to the case in hand. These are words of common style in all charters, though it frequently happens, that many of the particulars have no existence in the particulars disposed.

The words, *parts and pertinents*, comprehend every right connected with the subject principally disposed, and may be either a title of acquiring by prescription rights that did not fall under the original grant, or more properly are explanatory of what was meant to be comprehended under the grant, *viz.* whatever was at the time known to pertain thereto as part and pertinent.

And this last is precisely the case in hand : The lands of Ballachlachan were originally parts of the barony of Strathbran ; the grounds in question were common to that whole barony, and possessed as such in common, in the only way and manner it was then capable of being possessed : The feu-rights granted to the pursuer's predecessor, disposes the town and lands of Ballachlachan, with parts, pendicles, and pertinents, &c. " as largely in " all respects as the same had been bruicked and possessed before by the tenants and occupiers thereof, and were then possessed by the tenants therein mentioned."

And as it stands in proof, that the tenants of these lands have immemorially possessed this commonty, in the precise form and manner with the tenants and possessors of the other farms of this barony, and as immemorial possession proved, must presume *retro* to the very commencement of the right, it is a clear case, that these lands of Ballachlachan have that same right of commonty, or common property, in these muirs, as any of the other farms of this barony ; and consequently, that the possession
by

by them had, was a possession of common property, not of a servitude. Whilst this farm belonged to the defender's predecessors, the pasturage on this commony must have been enjoyed as a right of property, because *res sua nemini servit*; and as there is no limitation in the conveyance, the pursuer and his predecessors must have enjoyed it upon the same title as part and pertinent of their lands.

But there is truly no place now for a question of this kind, as it has been repeatedly so judged by your Lordships, in a variety of cases within these few years, which are all so well known to your Lordships, that the bare mentioning of their names will be sufficient. It was so judged in the division of Biggar commony; again in the division of Tranent muir; so also in the question respecting the Mearns muir; and but the other day, in the division of Reddingrig and Whitfiderig muirs, being originally parts of the barony of Abbotskerse: so that no one point can be better established than this, if such a train of decisions can establish any point.

It is a circumstance of no moment, whether the pursuer's property-lands consist of but 30, or of 300 acres; if his property is small, he will be intitled to so much a lesser share of the commony. The smallness of his property cannot surely be sustained as a sufficient reason for denying him his due proportion in the division of this muir as common property; and therefore he cannot doubt your Lordships will so find and declare.

In respect whereof, &c.

ALEX. LOCKHART.

MEMORIAL

FOR

Sir JOHN STEWART of *Grandtully*, Baronet.

IN the process brought at the instance of Archibald M'Duff of Ballinloan against Sir John Stewart of Grandtully, libelling upon the pursuer's right to " the lands of Balchlachan, with
 " houses, biggings, yards, orchards, tofts, crofts, outsets, graings,
 " sheallings, fishings, meadows, common pasturages, muirs,
 " marshes, mosses, liberties, freedoms, easements, privileges,
 " parts, pendicles, and haill pertinents whatsoever, used and
 " wont, pertaining to the said lands of Balchlachan, by all rights,
 " meiths and marches thereof, as the same were first occupied
 " and possessed by the tenants and possessors thereof; that, in
 " consequence of his right to these lands he, his predecessors
 " and authors had possessed and enjoyed, as part and pertinent
 " of these lands, past memory of man, the property of the sheal-
 " ling of Riebeg, as also another shealling called Blairnabuiag,
 " with the whole grazings and pasturages and others belonging
 " to these two sheallings, until several years ago, that the defender,
 " his predecessors or authors, violently encroached upon the pur-
 " suers's property, by entering into the possession of these two
 " sheallings and grazings belonging thereto; which posses-
 " sion the defender still continued in; and concluding that
 " it ought to be declared, that the property of these two sheal-
 " lings, with the whole grazings and others belonging thereto,

“ pertained and belonged to the pursuer, as part and pertinent
 “ of the said lands of Balchlachan :” Which conclusion, in the
 course of the process, the pursuer afterwards restricted to that of
 having only a right of common property in these sheallings. The
 Court of Session, after a proof had been led, and a state prepared,
 upon advising that state, on the 14th July current, pronounced
 the following interlocutor : “ The Lords having advised the state
 “ of the process, testimonies of the witnesses adduced, writs pro-
 “ duced, and heard parties procurators thereon, find, that the
 “ defender is entitled to continue in the exclusive possession of the
 “ ground called Riebeg as now inclosed and improven ; and
 “ that in case any action is brought for dividing the same and the
 “ grounds adjacent as a commonty, he shall be entitled to get
 “ the said farm of Riebeg adjudged to him as a part of his share,
 “ computing its value at what it may have been worth before a-
 “ ny improvement or inclosing, reserving always the question,
 “ Whether, upon such division, the pursuer is entitled to a share
 “ as having a right of common property, or only as having a right
 “ of servitude therein? and ordain memorials *hinc inde* to be given
 “ in, in this question, against the 21st July current ; with certifi-
 “ cation, that, if the memorials are not then put into the Lords
 “ boxes, they will not be received thereafter, but on payment of
 “ an amand of forty shillings Sterl.” By an after interlocutor,
 the Court allowed these memorials to be given in on or before
 the 28th current.

In obedience to this appointment, what follows is humbly sub-
 mitted to the Court on the part of Sir John Stewart the defender.

The Lords will then please remember, that the pursuer's right
 to the subjects in question stand thus : That, upon the 11th of
 April 1628, John M'Duff of Ballinloan, the pursuer's predecessor,
 acquired right by feu-contract from Sir William Stewart of
 Grandtully, the predecessor of the defender, “ to all and hail
 “ the town and lands of Balchlachan, with houses, biggings,
 “ yards, houses, tofts, crofts, annexis, outsets, cottages, connex-
 “ is, grazings, sheallings, fishings, meadows, pasturages, muirs,
 “ mires, mosses, common pasture, commonty, parts, pendicles,
 “ and pertinents whatsoever, pertaining, or that justly may ap-
 “ pertain thereto, by all right meiths, and marches thereof,
 “ used

“ used and wont, and als largely in all respects, as the samen-
 “ has been bruiked and joyed of before by the tenants and oc-
 “ cupiers thereof; and is now presently occupied and possessed
 “ by Thomas M'Duff, James Black, David M'Gilchrist, and
 “ John Moir M'Farlane, and their cottars, pertaining to the
 “ said Sir William by right heretable, lying betwixt the town
 “ and lands of Bellinliek on the east, and the town and lands
 “ of Carstormie on the west, within the barony of Strathbran,
 “ and sheriffdom of Perth, to be holden of the said Sir William,
 “ his heirs, assignees, and successors foresaids, in feu-farm and
 “ heritage for ever.” That by virtue of a precept of *clare con-*
stat, dated the 5th day of May 1732 years, granted by Sir
 George Stewart of Grandtully, the uncle and predeceffor of the
 defender, the pursuer stands infest upon the 22d day of May
 1732, in “ all and hail the town and lands of Balchlahan,
 “ with houses, biggings, yards, orchards, tofts, crofts, outsets,
 “ grazings, sheallings, fishings, meadows, common pasturage,
 “ muirs, marishes, mosses, liberties, freedoms, easements, privi-
 “ leges, parts, pendicles, and hail pertinentes whatsoever, used
 “ and wont, pertaining to the said lands of Balchlahan, be all
 “ rights, meiths, and marches thereof, as the same was first oc-
 “ cupied and possessed by the tenants and possessors thereof.”
 And that upon a special retour, dated the 9th of September
 1765, the defender, as heir of entail to Sir George Stewart of
 Grandtully his uncle, stands infest, amongst other lands, in the
 barony of Strathbran, comprehending the several lands therein
 mentioned, particularly those of Balchlahan.

The Lords will likewise please know, that these lands of Balch-
 lahan, independent of any grazings upon the hills of Strath-
 bran, that may have been used by the possessors thereof, are not
 in extent above 30 acres of ground; and that these hills of Strath-
 bran, a part of the barony of that name, all originally belong-
 ing to the defender's predeceffors, whereof the property still be-
 longs to him, except in so far as some small parts of that baro-
 ny have been sued, and hold of him as superior; which hills of
 Strathbran have never been inclosed by the defender or his pre-
 deceffors, nor set to any particular tenants, exclusive of others,
 but have been possessed in different places by the tenants
 of :

of the barony, according to the contiguity of those places to the farms set to these tenants, extend, it is believed, at least, to 6000 acres.

That it is an admitted fact, that this shealling of Riebeg, which is the only subject of the present question, has been possessed by the defender and his predecessors, as their exclusive property, at least from the year 1726, that the same was inclosed by the late Sir George Stewart of Grandtully, without any other interruption on the part of the pursuer, than that upon the 11th of July 1726, he took a protest against John M'Duff, then possessor of the ground where that shealling formerly had been, against his proceeding to build houses thereon, or labouring any part of the ground lying near it, till the commencement of the present process, at which time the years of prescription were run, which was only interrupted by a proof of the pursuer's minority, during a very short space of that period.

That it does not appear from the proof that has been adduced in this cause, that the pursuer ever attained to any other possession of this shealling, and the grounds adjacent, than to a promiscuous pasturing thereon, and by having a shealling there for some years before the time that it was inclosed by Sir George Stewart, the defender's predecessor: Whereas it is proved on the part of the defender, that before the time the tenants of Balchlachan, belonging to the pursuer, possessed this shealling of Riebeg, his predecessors tenants had sheallings there; and that the proprietor of Balchlachan, his ever having sheallings there, was owing to the farms of Tulloch and Carstormie, belonging to the defender, to which that shealling properly belonged, being inclosed, by which means they had no further use for the same.

That the tenants of Tulloch and Carstormie, belonging to the defender, possessed this shealling of Riebeg, before the tenants of Balchlachan, belonging to the pursuer did so, is plainly proved. John Steil, aged 100 years and upwards, page 19th of the printed State. Depones, " That he was born in Meikle Logy, in the
 " neighbourhood of the sheallings in dispute, where he lived
 " till he was about 8 years of age, when he went to some little
 " distance to herd, and continued to herd during the summer
 " season for several years thereafter, sometimes to tenants in the
 " neighbourhood

“ neighbourhood of said shealling, and sometimes to others at a
 “ distance therefrom. That during this period, he had occasion
 “ to see the tenants of Tulloch, belonging to the estate of Grand-
 “ tully, viz. James Maniter, Robert Fleming, and Alexander
 “ Duff, and likewise Thomas Fleming, Alexander Dow, and
 “ John Machemish, tenants in Carstormie; also a part of the
 “ estate of Grandtully, their bestial pasturing upon the shealling
 “ of Riebeg, and that the tenants of the said towns had sheal-
 “ bothies built thereon; those of Carstormie being built on
 “ the east, and those of Tulloch on the west side of the burn
 “ of Riebeg. That about 77 or 78 years ago, so far as he re-
 “ members, the said two towns of Tulloch and Carstormie
 “ were inclosed, and they have ever since been called the park
 “ of Strathbran; that after the said inclosure was made, there
 “ was no person that built sheal-bothies upon the foresaid Rie-
 “ beg for several years: That the first he observed to do so, was
 “ the tenants of Meikle Trochry, *which is a part of the estate of*
 “ *Grandtully*, who built bothies thereon, and shealled thereon,
 “ during two or three weeks in summer, for the space of five
 “ or six years. That during the possession of the Trochry-po-
 “ ple, as aforesaid of the said shealling, there was no other per-
 “ son that shealled there, so far as he knows.”

ALEXANDER MACFARLANE, aged 80, page 21 of the State.
 Depones, “ That he was married about 48 years ago; that be-
 “ fore, and mostly since that period, he has resided in Meikle
 “ Trochry: That some years before his marriage, the tenants
 “ of said Meikle Trochry, shealled four years, as he thinks, upon
 “ the grounds of Riebeg: That during the four years the Troch-
 “ ry people shealled at Riebeg, there were no other persons that
 “ shealled there, so far as he knows.”

WALTER STEWART, aged 79, page 22. Depones, “ That
 “ he was born in the neighbourhood of the sheallings of Rie-
 “ beg and Blairnabuiag, and has resided there all his life: That
 “ he remembers the tenants of Meikle Trochry many years ago
 “ shealling at Riebeg, which the deponent thinks was about the
 “ year 1712 or 1713 years: That they continued to sheall there
 “ for three years or thereby: That after the Trochry people
 “ left the said shealling of Riebeg, the tenants of Balchlachan
 “ shealled there till the year 1725; but that after the Trochry

“ people left the shealling, as aforesaid, there was two years that
 “ there was no body shealling at Riebeg.”

The right of the parties in the present question, according to the investitures, and likewise their possession, standing as above represented, Sir John Stewart the defender humbly apprehends, that the pursuer's right upon the subject in question can go no farther than that of a servitude, for the following reasons :

1^{mo}, That as the words of the original feu-right above recited, do not necessarily comprehend in them a right of common property, it is far more natural to presume that there was no more intended to be granted by Sir William Stewart the proprietor of the barony of Strathbran, to Archibald M'Duff, to whom he feued the lands of Balchlahan in the year 1628, than a right of servitude for pasturage upon the hills of Strathbran, so far as the tenants of Balchlahan, while these lands remained Sir William Stewart's, were in use to possess the same. It is, in the memorialist's apprehension, unnatural to think, that when a feu of so small extent as that of 30 acres, in exclusive property, was granted, that, as part and pertinent of that feu, a right of common property was intended to be granted in so large a tract of ground as that of the whole hills of Strathbran, which had never been set to particular tenants in exclusion of others. It may perhaps be contended for the pursuer, that the word *common* being mentioned in the feu-contract 1628, implies a right of common property : As to which, the memorialist begs leave to observe, that these words being subjoined to the words *common pasture*, cannot be understood to enlarge what was comprehended under the former words, which are commonly understood only to mean a servitude; and besides, the memorialist must observe, that that word *common* is not mentioned in the precept of *clare constat* whereupon the pursuer himself stands inest, nor, for what appears, in any right subsequent to the feu-contract in the year 1628; from whence it falls naturally to be presumed, that nothing special was meant to be comprehended under that word *common*, more than would have been understood if no such thing had been mentioned.

2^{do}, It appears to the memorialist, that if a right of common property had been intended by his predecessor to have been conveyed to the pursuer's predecessor in the year 1628, in so large

a tract of ground as that of the hills of Strathbran, it would not have been limited to the possession of the tenants, as mentioned in that feu-contract. If the feuar was to have a right of common property in the hills of Strathbran, he fell to have it in proportion to his exclusive property. The limiting therefore of his right to the possession of the tenants before the feu was granted, seems plainly to denote a right of servitude according to that possession, and not a right of common property.

3tho, If there were otherways difficulty in this matter, the memorialist apprehends, that, from the possession had by the several parties, there arises sufficient evidence that the property of this sheal of Riebeg now belongs to him, and that the pursuer has only a right of servitude thereon. The memorialist might admit, that, upon the supposal a right of common property was, by the feu-contract 1628, expressly granted to the pursuer's predecessor in this shealling of Riebeg, his possession since that time would be ascribed to that right of common property: But what he humbly contends, is, that the possession of the several parties sufficiently shows, that the right of the pursuer and his predecessors, was only a right of servitude, and that of the defender and his predecessors a right of property. Since the year 1726, that the defender and his predecessors have been in possession of this subject as their exclusive property, is admitted. That before that time, the pursuer's predecessors may, for a few years, have had a precarious or promiscuous pasturage, the memorialist has no occasion to deny: But this he begs leave the Court would advert to, that his predecessors tenants having possessed sheallings upon the subject now in dispute, which is an act of possession, which rather looks like a property than a servitude, is much stronger upon his part than that of the pursuers; as by the proof it appears, that the tenants of the defender's predecessors had sheallings there before the tenants of Balchlachan had any, and that these tenants of Balchlachan only took possession of these sheallings when the defender's tenants had no farther use for them.

The memorialist is aware that the Court has, in some cases, found parties intitled to a right of common property, where they had no right *per expressum* to the subject under division, but only a general right to their lands, with parts and pertinents; particularly

particularly in the case of Biggar in 1739, and in the later case of Sir Robert Pollock against the feuars of Merns-muir.

But these cases were extremely different from the present : For, in the *first* place, it was there admitted, that the muir in question was the common muir of a barony, possessed as such by all the tenants and others in the barony ; and that both parties were originally *in pari casu*, their property-lands having been anciently parts of that same barony, and, as such, intitled to their proportion of the common muir. *2dly*, Both parties in these cases proved, that they had been in the immemorial use of exercising all acts of common property in the muir, not only pasturage of cattle, but digging peats, casting seal, divot, cutting bent, &c. so that there was no ground for limiting the right of one party more than of the other to a servitude.

The present case is different in every circumstance. The hills in question are a part of the barony of Strathbran, belonging in property to the defender ; and any right which the pursuer can pretend to in these hills, must be founded on the general clause of his feu-charter flowing from the defender, giving him a right to parts, pendicles, common pasturage, &c. as occupied and possessed by the tenants, according to use and wont. These general words can convey no broader right from the defender to the pursuer, than the pursuer can show he was either possessed of at the date of the feu-right, or has since been possessed of. The whole was the original property of Sir John Stewart's predecessors, and must at this day be his property, unless in so far as the pursuer can show he has been denuded. The general words of the feu-charter are pliable in their nature, and must be explained by possession. By this criterion it must be judged, whether the pursuer's right is more or less extensive ; and therefore it is incumbent on the pursuer to satisfy the Court from the proof, that his right amounts to a common property.

It is laid down in our law-books, and has been always understood, that where a party has only exercised a right of pasturage, this amounts to nothing more than a servitude, and does not make him a common proprietor. Where acts of possession are, in their own nature, such as may either be ascribed to a right of property, or to a servitude, the principle of law is, That *levior obligatio semper præsumitur* : and this principle applies directly to
the

the present case, where the tendency of the pursuer's claim is to evict a part of the defender's property, for no other reason but because he has been in use, for some months in the summer, to pasture his cattle upon the barren hills, or rather upon a particular spot of these hills. The putting up little hutts for a shelter to his herds or servants, makes no difference, as it is laid down in the civil law, and perhaps is agreeable to our own law, that the putting up such hutts is consistent with a servitude of pasturage.

Several cases are to be found among the decisions, where the general clause of parts and pendicles, &c. has, from the possession, been constructed to carry only a servitude of pasturage; particularly in the case of Borthwick, 16th February 1668, observed by Lord Stair; and the same appears in effect to have been determined in the case, Haining against the Earl of Selkirk, 15th February that year: And where the words *common pasturage* are added to parts and pertinents, it is expressive of a servitude, as was found in the above-cited case of Biggar, *Dictionary*, vol. I. p. 147. that a clause with parts and pertinents, and *common pasturage used and wont*, did import only a right of servitude. In the late case too of the feuars of Merns-muir, sundry of the parties concerned were found to have only rights of pasturage, particularly Lord Eglinton's tenants of Eaglesham; the feuars of Floak and Cairn, and the proprietor of two farms called *Bannerbank* and *Langtown*; because they had never exercised any other right than that of pasturing a certain number of founs on the muir.

For the whole of these reasons, it is hoped the Lords will be clearly of opinion that the pursuer has instructed no right of common property in these hills.

In respect whereof, &c.

DAVID GRAHAME.

State Arch. & MacDuff

Sir John Stewart

39.

STATE of the PROCESS,

ARCHIBALD MACDUFF of Ballinloan,

A G A I N S T

Sir JOHN STEWART of Grandtully, Baronet.

THE said Archibald Macduff brought a process of A declarator, at his instance, against the said Sir John Stewart; libelling, That the said pursuer stands heritably infest and seised in all and hail the lands and others after mentioned, in virtue of a precept of B *Clare constat* from the deceased Sir George Stewart of Grandtully, Baronet, dated the 5th day of May 1732 years, and instrument of seisin following thereon, dated the 22d day of May, and registrate in the particular register of seisins the C 8th of June 1732 years: viz. All and hail the lands of Ballaclachan, with houses, biggings, yards, orchards, tofts, crofts, outsets, grafings, shealings, fishings, meadows, common pasturages, muirs, marshes, mosses, liberties, freedoms, D easements, privileges, parts, pendicles, and hail pertinent whatsomever, used and wont, pertaining to the said lands of Ballaclachan, be all rights, meiths, and marches thereof, as the same was first occupied and possessed by the tenants and E possessors thereof: And in consequence of his said infestment, and the other rights and intestments of the said lands of Ballaclachan, the said pursuer, and his predecessors and authors, have possessed and enjoyed, as part and pertinent of F the said lands, past memory of man, the property of the shealing of Riebeg, or at least the ground on which the

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same

A same is built, lying on the east side of the burn of Riebeg ;
 as also another shealing called *Blairnabuiag*, both lying in
 the hills betwixt the said lands of Ballaclachan and the o-
 ther lands adjacent thereto; and the march in the said hill,
 B betwixt that part of the country of Strathbrane and the bi-
 shoprick of Dunkeld; with the whole grafings and pastura-
 ges, and others, belonging to the said two shealings, until
 several years ago, that Sir John Stewart of Grandtully, the
 C deceased Sir George Stewart his uncle, or others his prede-
 cessors or authors, did violently incroach upon the said pur-
 suer's property, by entering into the possession of the said
 two shealings, and grafings belonging thereto: And the
 D said Sir John Stewart still continues the said violent posses-
 sion, thinking thereby to exclude the said pursuer from the
 said shealings, and establish the property thereof in his own
 person: And concluding, That it ought and should be
 E found and declared, by decret of the Lords of Coun-
 cil and Session, that the property of the two shealings
 above mentioned, with the whole grafings, and others,
 belonging thereto, does pertain and belong to the said
 F pursuer, as part and pertinent of the said lands of Bal-
 laclachan; and the same being so found and declared;
 the said Sir John Stewart ought and should be decern-
 ed and ordained, by decret foresaid, to make payment to
 G the said pursuer of the sum of L. 20 Sterling yearly as the
 rent of the said shealing, from and since he and his pre-
 decessors entered to the possession thereof, and in time coming,
 during the continuance thereof, with the sum of L. 100 Ster-
 H ling in name of damages, and as the expences of process.

There is produced for the pursuer the precept of *Clare con-*
stat, and instrument of seisin, both before mentioned, libelled
 upon, of the respective dates and contents before specified;
 I *Item*, Instrument of interruption, Archibald Macduff of Bal-
 linloan, against John Macduff, dated the 11th day of July

1726 years, and registrate in the register of interruptions, at A Edinburgh, the 27th day of the samen month.

At a calling of this action upon the 15th of January 1767, in presence of the Lord Pitfour Ordinary, his Lordship made avifandum to himself with this process, parties being under B communing. Thereafter there was given in for the said Archibald Macduff, pursuer, the following condescendence; bearing, That by contract of feu, dated the 11th of April 1628, entered into betwixt Sir William Stewart, then of C Grandtully, with consent therein mentioned, on the one part, and John Macduff, then of Ballinloan, on the other part, the said Sir William Stewart became bound, duly, validly, and sufficiently, to infest and seise the said John Macduff, his heirs D and assignees, in the lands and others after mentioned; and for that purpose, to grant charters of feu, containing precepts of seisin for infesting them, viz. All and hail the town and lands of Ballaclachan, with houses, biggings, yards, tofts, E crofts, outsets, cottages, annexes, connexes, grafings, shealings, fishings, meadows, pasturages, muirs, mires, mosses, common pasture, commonty, parts, pendicles, and pertinents, whatsoever, or that might justly appertain there- F to, by all rights, meiths, and marches, thereof, used and wont, and as largely in all respects as the same had been bruiked and possessed of before by the tenants and occupiers thereof, and were then possessed by the tenants there- G in mentioned, lying betwixt the town and lands of Ballinloan, on the east, and the town and lands of Carstormie, on the west, lying within the barony of Strathbrane and sheriffdom of Perth: That the pursuer has now right to these lands by H connected titles to the above John Macduff, and stands publicly infest therein in virtue of a precept of *Clare constat* granted by the late Sir George Stewart of Grandtully to him, as heir to his father, dated the 5th of May 1732, and his seisin follow- I ing thereon, dated the 22d day of May, and registrate the 8th of June 1732: That in consequence of the above contract, the pursuer and his predecessors enjoyed, as part and
pertinent

A pertinent of the said lands of Ballaclachan, the property of the shealing of Riebeg, or at least the ground upon which the same is built, lying upon the east side of the burn of Riebeg, as also another shealing called *Blairnabuiag*, both lying in
 B the hills betwixt the said lands and the other lands adjacent thereto, and the march in the said hills betwixt that part of the country of Strathbrane and the bishoprick of Dunkeld, with the whole grafings, pasturages, and others, belonging to
 C the said two shealings, without the smallest legal interruption, till about the year 1726, that the late Sir George Stewart of Grandtully turned them out of possession, and set the above shealing of Riebeg, (which he turned into a
 D farm, by building houses thereon, and ploughing up the ground), to one John Macduff: That the pursuer at this time interrupted the said John Macduff, as appears from a protest of the tenor following. “ At the shealing called *Riebeg*, be-
 E “ longing to Ballaclachan, the 11th of July 1726 years, and
 “ of the reign of his Majesty King George the 12th year, in
 “ presence of me notary-public, and witnesses after named,
 “ hereto subscribing, compeared personally Archibald Mac-
 F “ duff of Ballinloan, heritable proprietor of the town and
 “ lands of Ballinloan, mill thereof, grafings and shealings
 “ thereto belonging, with the pertinents; and with him Ro-
 “ bert Macduff merchant in Dunkeld, one of his curators;
 G “ and passed with me and my witnesses to the shealing of
 “ Riebeg; and there seeing a little house possessed by John
 “ Macduff, and another house building there; and having
 “ inquired at his spouse, he being absent, by whose order
 H “ the house was possessed? or if any tack was given to them
 “ in writing, or written orders? she replied, That by Sir
 “ George Stewart of Grandtully his orders it was possessed;
 “ but refused to show it, if she or her husband had any: And
 I “ the said Archibald Macduff finding the tenants of Balla-
 “ clachan molested by the said possession, and their goods
 “ daily hounded and driven off their usual going and pasture;
 “ declaring,

“ declaring, That, past memory of man, there never was a
 “ ny stop or interruption made against his tenants for pos-
 “ sessing the said shealings and grafings, by the said Sir
 “ George Stewart, his authors or predecessors, or their order;
 “ and thereupon the said Archibald made legal interrup- B
 “ tion, by throwing down a part of the little house;
 “ and also made interruption against building the o-
 “ ther house there, as having good and undoubted right
 “ to that shealing; and protested against the said John C
 “ Macduff his building up any more of the house, or
 “ possessing the other, or labouring any part of the ground
 “ lying near it; and thereupon asked and took instru-
 “ ments in my hands: And further protested, That John D
 “ Macduff might be liable for all cost, skaith, and damages,
 “ that the said Archibald or his tenants might be at, or
 “ incur, through want of the said shealing, and grafing there-
 “ of, and for remeid of law. These things were done and E
 “ acted at the said shealing of Riebeg, between the hours of
 “ one and two afternoon, or thereby, day, month, year, and
 “ his Majesty’s reign foresaid, in presence of James Stew-
 “ art in Logiealachie, John Macduff, son to William Mac- F
 “ duff in Ballaclachan, and Charles Small, son to me George
 “ Small notary-public in Dull, and hereto subscribing, wit-
 “ nesses to the premisses specially called and required.” The
 family of Grandtully having thus got possession of this sheal- G
 ing, by means which, though too common in that part of
 the country, are not altogether justifiable, the pursuer from
 time to time remonstrated, and demanded back his possession;
 which can be proved by Mr Archibald Stuart, then doer for H
 the family, and Mr Menzies of Culdares, and others. He
 was indeed unwilling to enter into a law-suit with such power-
 ful adversaries, the superiors of his whole estate; he was
 therefore perhaps too easily put off with fair promises and I
 flattering expectations of getting redress. He has however
 brought the present action within the years of prescription,

A as it will not be denied, that he was, for many years minor during the period which intervened betwixt the 11th of July 1726, the date of the protest, and the raising of this action in October 1766. He has indeed suffered one very great loss

B by this so long delay, which is, That the proof of his predecessors possession of this shealing, antecedent to the said year 1726, must now be difficult; and as his narrow fortune is but ill able to support the expence of a law-suit, he has been

C at some pains to be informed of the facts which, in the course of this process, he undertakes to prove; and shall endeavour to be as pointed as possible in stating of them, that the Lord Ordinary may thereby be the better enabled to judge of their

D relevancy. And in order to this the Lord Ordinary will be informed, that there are now in life one person of one hundred years old, another of ninety-seven, a third of eighty-two, a fourth of eighty, three of seventy, and several of sixty and

E upwards, who had particular access to know the shealings of Blairnabuiag and Riebeg. With regard to Blairnabuiag, so far as the pursuer's information goes, it seems to have been once the property of the pursuer's predecessors, though at

F starts, and precariously, it may have been possessed as a commonty between the tenants of Ballachlachan and Troch-ry; and some of the witnesses heard from people more aged than themselves, that the cattle of Ballaclachan were in use

G to pasture, and the cows thereof to be milked there; though it may be true, that said tenants of Ballaclachan have, for some years past, only possessed a part of the said shealing of Blairnabuiag, viz. that part which is next to their own

H dikes, and upon which very ancient huts belonging to them are raised. But the pursuer is less anxious about this shealing of Blairnabuiag than that of Riebeg, as indeed, now that the shealing is turned into a farm, he is thereby almost

I shut out from his other grafings in the hills; and the possessors of that farm are constantly hounding his cattle off their pasture, to his great annoyance. He shall, therefore, state

state the facts with regard to it. And here he must beg A
 leave to inform the Lord Ordinary, that all of these aged
 persons, except the first, whom he has not yet inquired at
 concerning it, concur in saying, not only from their own
 proper knowledge, but from the information of others, aged B
 sixty or seventy, whom they had occasion to be informed by
 in their youth, their shealing was possessed by the pursuer's
 predecessors, and their tenants. And although it may be
 true, that about fifty-seven years ago, when the proprietor C
 of Grandtully sold the shealing of Meikle Trochry to Logie-
 almond, the tenants of the said farm did pasture their cattle
 upon the shealing of Riebeg during two or three weeks, and
 only for two several years; yet this possession was confined D
 to that part of the shealing of Riebeg which lies on the west
 side of the burn of Riebeg: whereas the pursuer's tenants
 were in full and free possession of what lay on the east side.
 So that it is clear, that such precarious and different posses- E
 sion could operate nothing. But supposing the possession
 should come out, on proof, to have been promiscuous, the
 pursuer humbly submits to the Lord Ordinary, if he must
 not be still found to have a right of common pasturage up- F
 on said shealing of Riebeg; and that it cannot be converted
 to a farm, in regard the defender has no right thereto by
 charter, and has acquired none by prescription; and so is,
 at least, in that respect, in no better case than the pursuer, G
 who, though this shealing is not mentioned in his rights,
 has likewise possessed the same. Nay, his right must ap-
 pear better to the Lord Ordinary than that of Sir John
 Stewart: for there are many shealings to which the clauses H
 in Sir John's charter may apply; but there are none to
 which the article of shealings in the rights of the pursuer's
 predecessors can apply, except to those of Blairnabuiag and
 Riebeg; the latter of which, especially, lies most convenient I
 for him, and is, as it were, a pendicle of his farm. He
 therefore humbly hopes, that if the fact of exclusive posses-
 sion

A sion previous to the 1726 be admitted, the Lord Ordinary will find the same relevant to infer property; and if promiscuous possession shall be allowed, that the same will infer common pasturage. He trusts much to the candour of the

B gentlemen employed for the defender; and he is persuaded, that, if not much misinformed, they will admit the first: but should they yield the second, to avoid further expence and trouble, he will put up with it; and either betake himself to

C the common pasturage upon this farm, or will accept of the just and equal half thereof. But if the defender will admit neither of the facts, and the Lord Ordinary should judge them relevant to infer the respective conclusions, the pursuer, though

D extremely unwilling to put himself or the defender to further expence or trouble, must, with great reluctance, be obliged to have recourse to a proof before answer as to both. And to which condescendence there was given in for the said

E Sir John Stewart of Grandtully, defender, the following answers, SETTING FORTH, That the question presently depending betwixt Mr Macduff of Ballinloan and Sir John Stewart of Grandtully, being, How far the former has a

F right of exclusive property, at least of common property, along with the defender, in two shealings lying in the hill of Strathbrane, *Riebeg* and *Blairnabuiag*. In answer to the condescendence given in for the pursuer in this process, it is humbly insisted on for the defender, That as there appears no relevancy in the facts condescended on, no proof thereof ought to be allowed; which it is hoped will appear to the Lord Ordinary, when it is attended to, That it is admitted that these

H shealings were originally a part of the barony of Strathbrane, which whole barony formerly belonged to the defender's predecessors: That the pursuer only claims right to these shealings, in virtue of a feu-contract, dated the 11th of April

I 1628, whereby Sir William Stewart then of Grandtully, became bound to grant a feu-charter in favour of John Macduff of Ballinloan, of the town and lands of Ballaclachan, with

with houses, biggings, yards, tofts, crofts, outsets, cottages, A
 annexes, connexes, grafings, shealings, fishings, meadows,
 pasturages, muirs, mires, mosses, common pasture, common-
 ty, parts, pendicles, and pertinents whatsomever, or that just-
 ly might appertain thereto, by all rights, meiths, and marches B
 thereof, used and wont, and as largely in all respects as the
 same had been bruiked and possessed of before by the tenants
 and occupiers thereof, and were then possessed by the tenants
 therein mentioned: That some time preceding the year 1726, C
 full forty years before the commencement of the present ac-
 tion, these shealings were inclosed by the defender's predeces-
 sor Sir George Stewart; since which time they have been
 constantly possessed as the exclusive property of him and his D
 successors: That though the pursuer alledges, that the posi-
 tive prescription stands interrupted by his own minority; yet
 he does not undertake to prove, either that these shealings were
 at the date of the contract 1628 possessed by the tenants therein E
 mentioned as shealings wherein they had interest, or that they
 were possessed for forty years by him and his predecessors ante-
 rior to the inclosing thereof by the late Sir George Stewart; with-
 out a proof of the one or other of which particulars, in the F
 defender's apprehension, the pursuer's plea is quite untenible:
 He does indeed say in his condescendence, that there are some
 very old witnesses, particularly one person of a hundred years
 old, and another of ninety-seven, whom he proposes to ad- G
 duce in this cause; but he does not undertake to prove by the
 testimonies of these witnesses, that he and his predecessors en-
 joyed the peaceable possession of these shealings for forty years
 antecedent to the inclosing thereof by the defender's prede- H
 cessors; which proof seems to be absolutely necessary before
 any benefit from that possession can arise to him: That where
 possession is proved as far as the oldest witnesses in life can
 remember, there may in some cases arise a presumption of the I
 possession having been the same further back; but it is hum-
 bly thought that this will not apply to the present case, where
 C the

A the pursuer must impute it to himself, that he has allowed the defender's predecessors to continue so long in the sole and uninterrupted possession of these shealings, without laying any claim thereto; and that the rather, that it appears from the instrument of protest condescended on for him, that he pretended some right to one of these shealings as far back as the year 1726; since that time his making no attempt to vindicate such right seems to be a demonstration, that he was satisfied his pretence thereto was groundless. And the Lord Ordinary will please attend to what will be the necessary consequence, if in this case a proof of any slighter possession than that of forty years together, antecedent to the inclosing of these grounds by the defender's predecessor, should be available to create a right in the pursuer: it will thence follow, that the pursuer, who, if he had insisted in the present action before the year 1726, behoved to have proved forty years possession before he could prevail therein, then discovering that he could not make out such a proof at that time, when there was a number of witnesses living, with whose knowledge the possession of these years consisted, by letting the matter lie over for about forty years, renders it greatly more easy, by only proving twenty years, or perhaps a shorter possession, and arguing from thence, that the same must be presumed *retro*: That, upon these considerations, the defender hopes the Lord Ordinary will be of opinion, that no proof ought to be allowed to the pursuer in the present case, unless, either as above taken notice of, he shall undertake to prove, that the shealings he now pretends right to, were, at the time of the feu-contract 1628, possessed by the tenants named therein as the proper shealings of their farms, or that he and his predecessors had possessed the same, without interruption, for the space of forty years antecedent to their being inclosed by Sir George Stewart. At the same time, if the Lord Ordinary shall be of opinion, that there is such an appearance of relevancy in the facts condescended on for the pursuer, as that

a proof thereof, before answer, ought to be allowed, it will A likewise be incumbent upon him to prove his own minority, in order to interrupt the positive prescription, as the defender knows nothing of that fact : and in that case, the defender likewise insists on his predecessors having constantly, and B without interruption, possessed these grounds now pretended to by the pursuer, as their property, without any interruption on the part of the pursuer : That the shealing of Riebeg was of old understood to be the proper shealing of a farm C inclosed by one of the defender's predecessors, to the south of Riebeg, about eighty years ago, and possessed as such by the tenants of that farm ; and even the pursuer himself admits, in his condescendence, that the tenants of Meikle D Trochry, a town belonging to the defender, did sheal at Riebeg for two years together ; and that only about fifty-seven years ago : How then is it possible for him to prove an uninterrupted possession of that shealing for forty years prior E to the 1726 ? It is thought, that it will not be denied by the pursuer himself, that it is the universal custom of that country, that small towns, such as that of Ballaclachan, should have but one shealing ; and this it possesses at pre- F sent, and has been in possession of it for these forty years past, and more ; and this shealing lies in that part of the hill called *Blairnabuiag*. The defender will only beg leave to observe one thing as to *Blairnabuiag*, in order that the G Lord Ordinary may understand it : *Blairnabuiag* signifies, in English, *the field of the daisies* ; and a very large part of the hill of Strathbrane goes under that name. The shealing possessed at present by the town of Ballaclachan is called *Blairna- H buiag* ; because it lies in that part of the hill which goes under that name. The farm belonging to the defender, now claimed by the pursuer, lies also in that part of the hill called *Blairnabuiag*, and is itself called *Blairnabuiag*. The I defender might now proceed to state many things relative to the pursuer's claim on this farm of *Blairnabuiag*, taken from

A from the facts as laid down in his own condescendence, which he humbly thinks would be sufficient to convince the Lord Ordinary of the absurdity of the claim ; but he will trouble the Lord Ordinary with nothing on that head, as
 B the pursuer has not offered to prove one relevant fact as to it, and, in some measure, has passed from his claim upon it.

The Lord Pitfour Ordinary having, upon the 7th day of March 1767 years, considered the foregoing condescendence
 C given in for the pursuer, and answers foresaid made thereto for the defender, his Lordship, before answer, allowed the pursuer to prove his libel, and facts set forth in his condescendence, and all facts and circumstances relative thereto ;
 D allowed the defender to prove the facts set forth in his answers, and all facts and circumstances relative thereto ; and allowed both parties a conjunct probation upon the whole ; and granted commission and diligence.

E Whereupon both parties extracted acts and commissions, and expedite letters of diligence, at their instance ; and, by virtue thereof, caused cite several persons as witnesses, for proving the several points admitted to their respective probation ;
 F who accordingly compeared before the commissioners, and deponed as follows, viz.

G P U R S U E R ' s P R O O F.

Wit. 2.

Barbara Binning in Ladywell, widow, aged 78 years, depones, That she came to reside at Ballaclachan about fifty-
 H seven years ago, at least fifty-seven years at the 11th of June next, (i. e. June 1767) : That at this time she had occasion to see the pursuer, when he appeared to be a boy of about three years of age ; and the neighbours then told her, that he was
 I three years old the January preceding. And depones, That she has ever since been acquainted with the pursuer. *Causa scientie patet, &c.*

John

James Stewart in Tomnagrew, aged 69 years, depones, A Wit. 5.
That he saw the pursuer when he was at nurse, which was
about sixty years ago; and knows that the pursuer is at pre-
sent sixty years of age, and no more. And depones, That
from the time he saw the pursuer at nurse till now, he has B
known him; the deponent being a near relation of the pur-
suer's, and being often about his and his father's family.
Causa scientiæ patet, &c.

James Menzies of Culdare, aged 60 years, and upwards, C Wit. 1.
depones, That the pursuer, about the year 1732, or 1733,
complained to the deponent of Sir George Stewart of Grand-
tully having, in his minority, turned his tenants out of
shealings that had been regularly, and the deponent thinks D
the pursuer said yearly, possessed by him, and his authors,
past memory of man; and that by strong hand, without tak-
ing any legal step to authorise him the said Sir George for
so doing; and that this he had done by putting the said sheal- E
ings into corn-farms, and setting them to tenants: and at
this time the pursuer asked the deponent's advice, as a friend,
how to behave, so as to be put in possession of what he belie-
ved to be his undoubted right. Depones, That the pursuer, F
after several times laying open his grievances to the de-
ponent, as opportunities occasionally offered, insisted that
he should speak to Sir George Stewart about the matter:
That he declined speaking to Sir George thereanent; but G
promised to converse with Mr Mackewan, Sir George's
factor, upon the subject: which he afterwards did; but
could get nothing effectual done for the pursuer's interest.
Depones, That some time after the aforesaid period, and, as H
he thinks, about the 1734 years, 1735, or 1736, the pur-
suer continued to grumble at his situation: And he the de-
ponent being at that time obliged to be much at Edin-
burgh, undertook to advise his cause there, provided he I
would send him his papers to Edinburgh: That accordingly
D the

A the pursuer sent copies of his rights, either to the deponent, or to Mr Leonard Urquhart, his doer, from whom the deponent received them. Depones, That he the deponent, after receiving these papers, spoke to Mr Archibald Stuart, B writer to the signet, who was then doer for Sir George Stewart, and shewed them to him; but nothing further was then done anent the affair: And the deponent at this time advised the pursuer to have a little patience till some favourable C opportunity in the situation of the family of Grandtully should cast up, when he might more easily obtain redress of what he complained. Depones, That several years ago, but cannot say the precise number, the pursuer came to the deponent, and acquainted him, that there was a process about to be commenced betwixt Sir George Stewart and the proprietors of the bishoprick, relative to their marches or hill-grass; and that he the pursuer had been asked by the bishoprick people to join with them. Depones, That the pursuer at this time advised with the deponent as a friend, what course he should take. Depones, That he advised him not to meddle till he should see how things would turn F out; for probably, in the course of that process, things might cast up that would make the pursuer's claim appear in a favourable light, or that might be of advantage to him. Further depones, That the shealings Sir George Stewart had taken possession of, the pursuer informed him, were called G *Riebeg* and *Blairnabuiag*. And what he has deponed is truth, &c.

Wit. 3.

Margaret Macfarlane, spouse to James Macgilchrist in H Meikle Funduy, aged 72 years, depones, That her father was tenant in Meikle Trochry: That after the towns of Tullich and Carstormy were inclosed, and before the present town of Riebeg was built, the tenants of said Meikle Trochry I shealed their bestial at Riebeg for two years, and built their sheal-bothies on the west side of the burn, (as far as she remembers). Depones, That she was in use, during the two years,

years, of going to the shealings, to milk her father's cows, A which pastured there along with those of the other tenants of Trochry, as before mentioned. And depones, That so far as she remembers, there was no other person beside the Trochry people shealing at Riebeg during the aforesaid two B years. *Causa scientie patet, &c.*

Anne Robertson in Dilator, widow, aged 82 years or thereby, depones, That when she was about twelve years of age, she entered to the service of the pursuer's father as herd, and C continued therein for about three years: That during the said space, she had occasion to see the tenants of Ballaclachan sheal there with their bestial yearly, a little be-west Blairnabuiag, and be-west the burn of Auld-darg: That during the said three years space, she herded the bestial of a shealing in the neighbourhood belonging to the town of Bal-linlik, where the pursuer's father then resided; and that this shealing lay a little southward of the said shealing belonging E to the Ballaclachan tenants. Depones, That it was the practice for all the bestial in the neighbourhood, as well those of Ballaclachan as others, to pasture west from their own head-dikes of Ballaclachan to their aforesaid shealing, lying on the F west of Blairnabuiag, and that promiscuously, without any interruption. Depones, That that space of ground which goes under the name of *Blairnabuiag* extends from Loch-skiach, on the north-west, south to the burn of Pitroch, and G on the east, to the hills of the bishoprick. Depones, That during the aforesaid three years, there were no shealings built at Riebeg, at least that there was no person that shealed there. And being interrogate for the defender, depones, H That her father and mother resided in Tullich, one of the towns inclosed by the family of Grandtully many years ago: That she heard her mother say, that she has called down the goats from Riebeg to the Tullich. And further depones, I That she never heard that Riebeg was the shealing of any particular town in the neighbourhood, either of Carstormy,

Wit. 4.
cited for both
parties.

or

A or Tullich, or Ballaclachan; but that the tenants of Ballaclachan pastured their bestial thereon, along with those of their neighbours. *Causa scientie patet, &c.*

Wit. 6.

Thomas Gow in Little Town of Inchmagrannach, widdower, aged 70 years or thereby, depones, That ever since he was ten years of age, he has known the shealing of Riebeg, and was herding in the neighbourhood thereof for many years. And depones, That from that time till the town of Riebeg was laboured by John Duff, he knows the tenants of Ballaclachan were in use to sheal at Riebeg yearly, and had their sheal-bothies upon the east side of the burn of Riebeg. Depones, That the said John Duff was tenant in Ballaclachan before he entered to the possession of Riebeg, which was about forty years ago, as he thinks; and that he and his son have continued to possess the same as tenants to the family ever since. And further deposes, E That the tenants of Strathbrane pasture their bestial promiscuously without their head-dikes, from one end of the country to the other; and that they have done so ever since the deponent was a herd as before mentioned. *Causa scientie patet.* And this is truth, &c.

Wit. 7.
cited for both
parties.

John Murray in Borlick, aged 68 years, depones, That he was born in Meikle Trochry, and lived there till within these twenty-four years past; and since that time has resided in the neighbourhood thereof, in Borlick, where he now lives. Depones, That when he was about eight years of age, he herded the bestial of Trochry on the shealing of Riebeg; and remembers, that the tenants of that town shealed there for four H or five years about that period; and that their sheal-bothies were upon the east side of the burn of Riebeg. Depones, That during the time the Trochry people shealed at Riebeg, as before deposed to, Alexander Macduff tenant in Ballaclachan also shealed there, and had his sheal-bothies upon the west side of the burn of Riebeg; but does not remember whether

ther any more of the tenants of Ballaclachan herded there or A
not. *Causa scientiæ patet, &c.*

Donald Macintosh smith in Deriulich, aged 74 years, de-
pones, That he was born and lived at Ballaclachan till he was
about thirty-four years of age, except one summer that he herd- B
ed to the tenants of Trochry : That he remembers the time of
the pursuer's birth ; and it is now sixty years bypast, in the
month of January last. And further depones, That he re-
members of the tenants of Ballaclachan, when he the deponent C
was about six years of age, having their sheal-bothies at Rie-
beg ; and that none else had bothies there ; and that these
bothies stood upon the east of the burn of Riebeg. Depones,
That when he was about ten or twelve years of age, the te- D
nants of Meikle Trochry came and shealed also at Riebeg,
where they continued shealing for about two years, and af-
terwards left the same : That their sheal-bothies stood upon
the west side of the burn of Riebeg. Depones, That after E
this the tenants of Ballaclachan continued to sheal at Riebeg
till the deponent left that country ; and that his father's be-
stial always shealed there, he being a tenant in Ballaclachan.
And upon the defender's interrogatory, depones, That during F
the aforesaid space that the Ballaclachan tenants shealed at
Riebeg, they had no shealing at Blairnabuiag ; but that their
bestial pastured westward from Riebeg to Blairnabuiag ; and
that the rest of the bestial in the neighbourhood also did the G
same. Depones also, That if the cattle had gone over to the
hills of Grandtully, or other hills in the neighbourhood, no
person would have stopped them, the pasture above the head-
dikes being promiscuous to the whole tenants in Strathbranc. H
Causa scientiæ patet, &c.

Wit. 8.

Donald Macduff in Tomnagairn, aged 67 years, depones,
That he has resided in the neighbourhood of Riebeg ever since
he was nine years of age, except for two years and a half I
that he was in the low country. Depones, That from that
period, till Riebeg was laboured by John Duff, the tenants of
E Ballaclachan

Wit. 9.

A Ballaclachan were always in use of shealing there, and had their sheal-bothies upon the east side of the burn of Riebeg, within the present inclosures and corn-fields of Riebeg. Depones, That he remembers the aforesaid John Duff began to B labour Riebeg in the year 1725. *Causa scientiæ patet, &c.*

D E F E N D E R ' s P R O O F .

Wit. 1. C John Steill in Shanks, being called as a witness, the pursuer objected to his being received, for the following reasons: 1st, Because he is a common beggar, and not worth his Majesty's unlaw; and, *second*, He is a person of bad fame, having been D suspected of several theftuous practices; and, particularly, he was suspected and accused some years ago, when he lived in this country, of stealing some of his neighbours sheep, or the chain of a boat, belonging to some person in his neighbour- E hood, which obliged him to leave the same; and he has never returned to this country since to reside. Answered by James Stewart for the defender, That there is nothing in the first objection, as in all disputes concerning marches, particu- F larly hill-marches, herds, and other poor people of the lowest condition, are the only persons who generally have access to know the facts concerning marches. And as to his not being worth the King's unlaw, that is a fact that cannot be ascer- G tained until the man's death, as it often happens that great sums of money have been found in their custody. As to the second objection, it is only said, That he is suspected of theft; it is not said that he was regularly convicted thereof, nor de- H clared infamous; and the suspicion is entirely without foundation. Further, That in cases where a proof of facts that have happened at least eighty years ago, it is singular to find a man of the age of this witness; and that in cases of penury, wit- I nesses have been allowed of, and their depositions received when they were in the nearest relation to the parties. These objections come with a very bad grace from the present pursuer,

fuer, as the long delay has been occasioned by himself; by A
 which means there must be a great penury in this case; where-
 as had this process been brought in due time, there could not
 have been any dispute, as every person in the country must
 have known the true state of the fact. Further, That he possessed B
 a mailing of ground along with his grandson: That he has been
 adduced in many processes concerning marches of late, and
 no objections started. To which the pursuer replied, That the
 objections stated by him against the witness, he apprehends, C
 are sufficient to cast him from being received as an evidence in
 the cause; and he craves the commissioner will allow him a
 proof thereof, he having cited witnesses for proving the same.
 Replied, That no proof can be allowed at present: That there D
 is no warrant for taking a proof concerning the characters
 of any of the witnesses: That in this case it would be ex-
 tremely hard, as the objections were not known to the pursuer
 till just now: That in all cases where objections are started to E
 witnesses, and a proof taken by commissioners, the commis-
 sioner takes the deposition of the witnesses, reserving the rele-
 vancy of these objections to the determination of the court
 from whence the commission was issued. The commissioner F
 having considered the foregoing debate, he refers the strength
 and effect thereof to the determination of the court; and in
 the mean time allows the witness to be examined. And the
 said John Steill, aged 100 years and upwards, depones, That G
 he was born in Meikle Logy, in the neighbourhood of the
 shealings in dispute, where he lived till he was about eight
 years of age, when he went to some little distance to herd,
 and continued to herd during the summer-season for several H
 years thereafter, sometimes to tenants in the neighbourhood
 of said shealings, and sometimes to others at a distance there-
 from. Depones, That during this period he had occasion to
 see the tenants of Tulloch, belonging to the estate of Grand-I
 tully, viz. James Maniter, Robert Fleming, and Alexander
 Duff, and likewise Thomas Fleming, Alexander Dow, and
 John

- A John Machemish, tenants in Carstormy, also a part of the estate of Grandtully, their bestial pasturing upon the shealing of Riebeg; and that the tenants of the said towns had shealbothies built thereon, those of Carstormy being built on the east, and those of Tulloch on the west side of the burn of Riebeg. Depones, That about seventy-seven or seventy-eight years ago, so far as he remembers, the said two towns of Tulloch and Carstormy were inclosed, and have ever since been called the *Park of Strathbrane*. And further depones, That after the said inclosure was made, there was no person that built shealbothies upon the foresaid Riebeg for several years: That the first he observed do so was the tenants of D Meikle Trochry, who built bothies thereon, and shealed thereon during two or three weeks in summer for the space of five or six years. Depones, That the shealbothies of Trochry were built upon the east side of the burn of Riebeg. And depones; E That during the possession of the Trochry people as aforesaid of the said shealing, there was no other person that shealed there, so far as he knows: That the aforesaid Thomas Fleming built a small steading of houses, and tilled some ground F a little north-west of Tulloch and Carstormy, towards the place where the town of Riebeg now stands; but he only occupied the same for a year, his crop not having ripened, owing to the badness of the season; whereby he lost the G same, and was thereby reduced to beggary; and no body has ever since possessed it; and that this happened two years after the said park was finished. And further depones, That the tenants of Ballaclachan had a shealing a little be-west Blair-H nabuiag, and were in use of building their shealbothies hard by the burn of Ald-darg as far back as he remembers, and before the aforesaid parks or towns of Tulloch or Carstormy were inclosed: That the bestial belonging to the tenants of Ballaclachan likewise, as far back as he remembers, were in use, at all seasons of the year, of pasturing their bestial, in common with the bestial belonging to the tenants in

in the neighbourhood, on the estate of the barony of Strath- A
brane, westward from Ballaclachan, without the head-dikes,
towards Riebeg, and from thence westward to the aforeſaid
ſhealing, near the burn of Auld-darg, without any interrup-
tion; and they always paſtured in this manner their beſtial, B
except when they were feeding within the head-dikes. And
what he has deponed is truth, &c.

Wit. 2.

Alexander Macfarlane in Meikle Trochry, aged 80 years,
or thereby, depones, That he was married about forty-eight C
years ago: That before, and moſtly ſince that period, he
has reſided in Meikle Trochry. Depones, That he remem-
bers, that ſome few years before his marriage, the tenants
of ſaid Meikle Trochry ſhealed four years, as he thinks, D
upon the grounds of Riebeg, their bothies being upon the
eaſt ſide of the burn of Riebeg. And being interrogate,
Whether or not he knows who occupied Riebeg before the
tenants of Meikle Trochry took poſſeſſion thereof as afore- E
ſaid? depones, He does not know. Depones, That the rea-
ſon the Meikle Trochry people deſerted that ſhealing was,
becauſe their beſtial did not thrive there, and went in a-
mong their neighbours corns, ſeeking homeward to Trochry F
on the other ſide of the water of Braan. Depones, That du-
ring the four years the Trochry people ſhealed at Riebeg,
there were no other perſons that ſhealed there, ſo far as he
knows; but has heard there was a hut on the weſt ſide of the G
burn; but who poſſeſſed the ſame, knows not; nor did he
ſee ſaid hut, being very ſeldom at ſaid ſhealing. *Cauſa ſcien-
tiæ patet, &c.*

Wit. 3.

John Scrymgeour in Tombain, married, aged 64, depones, H
That he lived in the neighbourhood of the ſhealing of Rie-
beg in the year 1716, and for ſeveral years thereafter. De-
pones, That he knows the tenants of Ballaclachan ſhealed
at Riebeg in the ſaid year 1716, and from that time till the I
year 1725; and that their ſheal-bothies ſtood upon the eaſt
ſide of the burn of Riebeg. Further depones, That in the
F year

A year 1725, the grounds of Riebeg were laboured by John Duff, tenant to Sir George Stewart of Grandtully; and that the same has been ever since possessed by tenants of the family of Grandtully. And being interrogate, depones, That

B during the aforesaid period that the tenants of Ballaclachan shealed at Riebeg, the tenants in the neighbourhood pastured their bestial upon the grounds of Riebeg promiscuously with theirs; and the tenants of Ballaclachan's bestial also pastured promiscuously with those of the neighbours upon their shealings. And further depones, That during the above space, betwixt the 1716 and 1725, the tenants of Ballaclachan did not sheal at Blairnabuiag, on the west side of the

D burn of Auld-darg; neither did any other person sheal there during that period. Depones, That he has heard, that before the tenants of Ballaclachan shealed at Riebeg, the tenants of Meikle Trochry had shealed there; and that before the tenants of Meikle Trochry shealed there, he has heard the tenants of Tulloch and Carstormy had shealings there, before the said towns were turned into grass, and made a grass-park. Further depones, That, so far as he knows, none of

F the towns in Strathbrane have but one shealing belonging to them, at least more than one place where their huts are built; as they generally reside at one place during the shealing-season. *Causa scientie patet, &c.*

Wit. 4. G Walter Stewart in Meikle Tombain, widower, aged 79 years, depones, That he was born in the neighbourhood of the shealings of Riebeg and Blairnabuiag, and has resided there all his life. And depones, That he remembers the tenants of Meikle Trochry many years ago shealing at Riebeg; which the deponent thinks was about the year 1712 or 1713 years: That they continued to sheal there for three years, or thereby. Depones, That after the Trochry people left the

I said shealing of Riebeg, the tenants of Ballaclachan shealed there till the year 1725; but that after the Trochry people left the shealing as aforesaid, there was two years that there was

was no body shealing at Riebeg. And further depones, A
 That during the time the Trochry tenants possessed the
 said shealing, the people of Ballaclachan, and others in
 the neighbourhood, pastured their bestial promiscuously
 upon the grounds thereof with theirs; and that when B
 the Ballaclachan tenants possessed it, the bestial belonging
 to the tenants in the neighbourhood likewise pastured pro-
 miscuously with theirs on said shealing; and the Ballaclachan
 bestial again pastured upon their shealings. And, being fur- C
 ther interrogate, depones, That during the most of the
 years that the Ballaclachan tenants possessed the shealings of
 Riebeg, as aforesaid, they were in use, in the beginning of
 summer, to go west to the shealing lying be-west of Blairna- D
 buiag, and on the west edge of the burn of Auld-darg,
 where they staid for some time, and thereafter came east-
 ward to Riebeg, where they shealed till the shealing-season
 was over. Depones, That the sheal-bothies of Riebeg were E
 upon the east side of the burn of Riebeg, both when the
 Trochry tenants possessed it, and when it was possessed
 by the tenants of Ballaclachan. Further depones, That he
 has heard that the shealings of Riebeg was possessed by the F
 tenants of Tulloch and Carstormy, before their possessions
 were inclosed; but that he never saw them there. Depones,
 That Riebeg was laboured about forty-three years ago; and
 that it was some time after that Blairnabuiag was built. G
Causa scientie patet. And this is truth, &c.

John Black in Meikle Trochry, aged 60 years, depones,
 That he was born in Meikle Trochry; where he has conti-
 nued all his lifetime: That he remembers, when he was about H
 six years of age, of the tenants of that town going to sheal at
 Riebeg; and that they continued to do so for about three or
 four years. Depones, That he thinks part of their sheal-bo-
 thies, if not the whole, were upon the east side of the burn I
 of Riebeg, being so young that he cannot remember distinct-
 ly about the matter. And depones, That he heard it from

Wit. 5.

an

A an old man, one Michael Steel, in Meikle Trochry, who was said to be about ninety-six or ninety-seven, that Riebeg was the shealing of Tulloch and Carstormy, now inclosed. *Causa scientie patet.* And this is truth, &c.

- Wit. 6. B John Macleish, in Kirktown of Logieallachy, aged 60 years, depones, That he was born at Ballaclachan, in the neighbourhood of Riebeg; and has resided there, and in that neighbourhood, ever since. Depones, That so far as he the
 C deponent can remember, the tenants of Ballaclachan always possessed the shealings of Riebeg; and that part of their bothies were upon the west side of the burn of Riebeg, but most of them were upon the east side thereof. Depones,
 D That he has heard the tenants of Meikle Trochry shealed at Riebeg; but does not know if any others shealed there at the same time. And further depones, That his father told him the deponent, that he his father had heard, that the
 E shealing of Riebeg was formerly possessed by the tenants of Tulloch and Carstormy; but that he never heard any body besides his father say so: That his father lived all his life in the town of Pitleoch, the next town to Riebeg; and that
 F long before the towns of Tulloch and Carstormy were inclosed. Depones, That Riebeg was first laboured about forty-one or forty-two years ago; and that it was four or five years after this before Blairnabuiag was inclosed and labour-
 G ed. *Causa scientie patet.* And this is truth, &c.

With all which great avisandum was made, upon the 17th and 22d days of July 1767.

GEO. BROWN.

November 16. 1768.

Unto the Right Honourable the Lords of Council and Session,

T H E

P E T I T I O N

Sir J O H N S T E W A R T of Grandtully, Bart.

Humbly Sheweth;

THAT in the process at the instance of Archibald M'Duff of Balinloan, against your petitioner, concluding to have the property of certain grounds ascertained to him, which had long ago been inclosed and improved by the petitioner's predecessors, your Lordships, of this date, pronounced the following interlocutor: July 14.
1768.

“ The Lords having advised the state of the process; testimonies of the witnesses adduced, writs produced, and heard parties procurators thereon; find, That the defender is intitled to continue in the exclusive possession of the ground called Riebeg, as now inclosed and improven; and that, in case any action is brought for dividing the same and the grounds adjacent, as a commonity, he shall be intitled to get the said farm of Riebeg adjudged to him as a part of his share, computing its value at what it may have been worth before any improvement
A ment

“ ment or inclosing ; reserving always the question, Whether,
 “ upon such division, the pursuer is intitled to a share as having
 “ a right of common property, or only as having a right of ser-
 “ vitude therein ? And ordain memorials *hinc inde* to be given
 “ in on this question, &c.”

Aug. 5.
 1768.

And, upon advising memorials, your Lordships, of this date, pronounced the following interlocutor : “ Find, That the pursuer has a right of common property in the *common of Strathbrane*, corresponding to his lands of Ballachlachan ; and ‘decern and declare accordingly, superseding extract till the fourth federunt day of November next.”

It was not perhaps attended to by the Court, when the above interlocutor was pronounced, that the barony of Strathbrane is a very extensive tract of country, consisting chiefly of hills and muirs, all of which may in one sense be considered as common, the tenants of the low grounds having generally been permitted to drive their cattle upon the hills next adjacent to them, where they could find any pasture, without molestation from the proprietor ; so that the general words of the interlocutor, if not explained, might give a pretence to Mr M'Duff to maintain, that he is intitled to a proportional share, effeiring to his valued rent, of the whole high grounds of Strathbrane, whether near him or at a distance, and whether he has had any connection with them or not.

It will be remembered, that Mr M'Duff has two little feus, viz. Balinloan and Ballachlachan. On the first of these there is a mill with certain astricted multures, and by reason of this mill and multures, tho' the arable lands belonging to the feu are not above thirty acres, and that of Ballachlachan about as much, his valued rent of Balinloan amounts to no less than L. 200 Scots, and Ballachlachan to about L. 30 more, which is above a fifth part of Sir John Stewart's valued rent of the whole barony of Strathbrane, his valuation of said barony being no more than L. 1000 Scots. Your Lordships therefore have by your interlocutor given the pursuer a handle to contend, that a fifth part of the whole hills, muirs, and pasturages of Strathbrane must belong to him in property upon a division, altho' the arable ground of both his feus is not above 60 acres, as already mentioned ; whereas the petitioner's arable lands consist of many
 hundreds

hundreds of acres, and are at least thirty times the extent and value of Mr M'Duff's.

What will render this plea the more extraordinary is, that the river of Brane divides one part of the barony from another, and that Mr M'Duff's is just as much detached from many of these hills and muirs, as if they were in a different kingdom.

And what makes the case still harder is, that your Lordships, (with great submission) have proceeded to ascertain this right in his favour without any proof, in a process containing no such conclusion, and where he himself demanded no such right.

For these reasons the petitioner hopes he will be excused for laying this matter once more before the Court, in order to obtain at least an explanation, if not a total alteration of the interlocutor last above recited.

The predecessor of the pursuer obtained in 1628 a feu-right from Sir William Stewart of Grandtully the petitioner's predecessor, of "all and hail the town and lands of Ballachlachan, "with houses, biggings, yards, houses, tofts, crofts, annexis, "outsets, cottages, connexis, grafings, sheallings, fishings, "meadows, pasturages, muirs, mires, mosses, common pasture, commony, parts, pendicles, and pertinents whatsoever, pertaining, or that justly may appertain thereto, by all "right meiths and marches thereof, used and wont, and as "largely in all respects as the samen has been bruicked and joyed of before by the tenants and occupiers thereof, and as now "presently occupied and possessed by Thomas M'Duff, James "Black, David M'Gilchrist, and John Moir-M'Farlane, and "their cottars, pertaining to the said Sir William by right heretable, lying betwixt the town and lands of Balinleik on the "east, and the town and lands of Carstormie on the west, within the barony of Strathbrane and sheriffdom of Perth, to be "holden of the said Sir William, his heirs, assignees and successors foresaids, in feu-farm and heretage for ever."

The pursuer himself stands in feft upon a precept of *clare constat* from the late Sir George Stewart of Grandtully, of date 5th May 1732, "in all and hail the town and lands of Ballachlachan, "with houses, biggings, yards, orchyards, tofts, crofts, "outsets, grafings, sheallings, fishings, meadows, common pasture, muirs, marshes, mosses, liberties, freedoms, easements, "privileges,

“ privileges, parts, pendicles, and haill pertinents whatsoever,
 “ used and wont, pertaining to the said lands of Ballachlachan,
 “ be all rights, meiths, and marches thereof, as the same was
 “ first occupied and possessed by the tenants and possessors
 “ thereof.”

The petitioner, as heir of his predecessors, stands infest upon a charter under the great seal, in all and whole the lands and barony of Strathbrane, containing a number of towns, farms, villages, &c. and among others the lands of Balinloan and Ballachlachan, with forests, grasings, parts, pendicles, pertinents, &c. of the said lands and barony.

The general custom of the barony is, that the tenants and feuars send their cattle in the summer time to the hill which lies next contiguous to them ; and upon this hill or high ground each town or steading has been in use to have a shealling. Mr M'Duff, for his town of Ballachlachan, is in possession of a shealling called Blairnabuiag upon the hill of Blairnabuiag, at a little distance to the north-west of his feu ; and he has been allowed to pasture upon that hill without interruption in the neighbourhood of his shealling. This was all that was meant by the general clause above mentioned in his feu-right of “ sheallings, “ grasings, common pasturages, commonties, parts, pertinents, “ &c. used and wont, by all right, meiths and marches, and as “ formerly enjoyed by the tenants and possessors thereof.” These words give him no indefinite right, but a limited right, according to *use and wont* : And if it shall appear that he never possessed any thing more than a right of pasturage in the neighbourhood of a shealling, with the use of those huts called the shealling, for the conveniency of his herds in the summer time, and for pasturing such a number of cattle as he could maintain on his feu in the winter ; it is with submission thought, that your Lordships will not incline to extend or construe this into a more ample right, so as to make him a joint proprietor of these grounds where he has been in use to pasture ; far less will you give him a fifth part of the whole high grounds of Strathbrane, even those which are disjoined from him by rivers, which, however, he will contend to be the meaning and import of the last interlocutor.

What

What occasioned the present process at his instance against Sir John Stewart, was the following circumstance, and by attending to it, and to his own allegations in the cause, your Lordships will see that he never once dream'd of the ample right, which he will now say is implied in the interlocutor.

About the year 1690 or 1692, Sir George Stewart of Grandtully, inclosed two of his farms or towns, called Tulloch and Carstormie in the neighbourhood of Ballachlachan, and converted them into a park, which he called the park of Strathbrane. The tenants of these two towns, had been possessed of certain sheall-bothies at a place called Riebeg, upon the burn of Riebeg, lying between the low grounds and the shealling above-mentioned of Blairnabuiag, which last was the shealling of Ballachlachan. The sheall-huts of Carstormie were on one side of the burn, those of Tulloch on the other, and they were in a manner one shealling, though belonging to two towns.

The tenants of Tulloch and Carstormie having been dispossessed, and their grounds converted into a park, their sheall-huts became unoccupied, and were entirely waste for some years, till about the 1698, or beginning of this century, the tenants of Meikle Trochry, another town belonging in property to Sir John Stewart, sent their cattle to these sheallings, and continued in the custom of so doing till about the 1710 or 1712, when finding this shealling inconvenient for them and at too great a distance, they gave over making use of it, and the huts being once more empty, Mr M'Duff's tenant of Ballachlachan naturally took possession of them, as they were just in the way in passing to his own shealling of Blairnabuiag.

Mr M'Duff continued this possession in a sort of precarious way, sometimes going to Riebeg, sometimes to Blairnabuiag till the year 1725, when Sir George Stewart thought proper also to inclose what had been the shealling of Riebeg, and it did not occur, that there was any thing to hinder him from so doing, any more than from inclosing the two farms of Tulloch and Carstormie, by the tenants of which, this shealling had been occupied. Sir George at the same time, inclosed another small spot or pendicle of the hill of Blairnabuiag, which he called the farm of Blairnabuiag, but no way encroaching on Mr M'Duff's

B.

shealling

shealling of Blairnabuiag, which lyes indeed on the same hill, but further to the north.

The pursuer, who was then a young man, and had been accustomed from his infancy to see his herds and cattle occupy the shealling of Riebeg without any hindrance, imagined perhaps *bona fide*, that the inclosing this shealling was an incroachment upon him, and therefore, took a protest against Sir George, setting furth that he had a right by his feu to sheallings and grassings, “ and that past memory of man, there never had
“ been any stop or interruption made against his tenants for
“ possessing the said sheallings and grassings by the said Sir
“ George Stewart, his authors, or predecessors, or their or-
“ der ;” he therefore made interruption, &c. and protested against labouring or taking in any part of the shealling in question : This protest, which bears date 11th July 1726, was only taken with regard to Reibeg, but no challenge was made of the other little inclosure called Blairnabuiag.

Mr M'Duff did not carry his challenge even with regard to Riebeg any further. He was probably advised, upon enquiry and more mature deliberation, that there was no foundation whatever for his pretensions to that spot ; he acquiesced in Sir George's exclusive possession, and that of his successors from the year 1726, down to the commencement of the present process, being more than 40 years, and the positive prescription has only been saved by his having been minor for a few months after the 1726.

However, at so great a distance of time, did he think proper to commence this action, and your Lordships will observe the conclusions of it.

After setting furth his feu-right, the summons proceeds,
“ And in consequence of his said infestment, and the other
“ rights and infestments of the said lands of Ballachlachan, the
“ said pursuer, and his predecessors and authors, have possessed
“ and enjoyed, as part and pertinent of the said lands, past
“ memory of man, the property of the shealling of Riebeg, or
“ at least, the ground on which the same is built, being on the
“ east side of the burn of Riebeg, as also another shealling called
“ Blairnabuiag, both lying in the hills betwixt the said lands of Bal-
“ lachlachlan, and the other lands adjacent thereto ; and the
“ march in the said hill, betwixt that part of the country of
“ Strathbràne.

“ Strathbrane and the bishoprick of Dunkeld ; with the whole
 “ grassings and pasturages, and others belonging to the said
 “ two sheallings, until several years ago, that Sir John Stewart
 “ of Grandtully, the decest Sir George Stewart his uncle, or
 “ others his predecessors or authors did violently incroach upon
 “ the said pursuer’s property, by entering into the possession
 “ of the said two sheallings, and grassings belonging thereto ;
 “ and the said Sir John Stewart violently continues the said vi-
 “ olent possession, thinking thereby to exclude the said pursuer
 “ from the said sheallings, and establish the property thereof in
 “ his own person.”

He therefore concludes, that it ought, and should be found
 and declared, “ That the property of *the two sheallings* above-
 “ mentioned, with the whole grassings and others belonging
 “ thereto, does pertain and belong to the said pursuer as part
 “ and pertinent of the said lands of Ballachlachan, and the
 “ same being so found and declared, the said Sir John Stewart
 “ ought and should be decerned and ordained by decreet fore-
 “ said, to make payment to the said pursuer of the sum of L. 20
 “ Sterling yearly, as the rent of the said shealling, from and
 “ since, he and his predecessors entered to the possession there-
 “ of, and in time coming, during the continuance thereof,
 “ with the sum of L. 100 Sterling in name of damages.”

This is a conclusion merely to have the *two sheallings* with the
 grassings belonging to them, ascertained to him in property.
 With regard to Blairnabuiag, *i. e.* the little spot of ground which
 was inclosed under that name ; he declared in a condescendence
 given in to the Lord Ordinary, that he was *little anxious about it*,
 and even as to Riebeg, he signified that he was willing to con-
 fine his claim upon it to a right of *common pasturage*, for after ad-
 mitting that the tenants of Meikle Trochry did once pasture
 their cattle upon a part at least of said shealling, he adds, “ but
 “ supposing the possession should come out on proof to have been
 “ promiscuous, the pursuer submits to the Lord Ordinary, if
 “ he must not still be found to have a *right of common pasturage* up-
 “ on said shealling of Riebeg, and that it cannot be converted to
 “ a farm, in regard the defender has no right thereto by charter,
 “ and has acquired none by prescription, &c.” He concludes
 in this manner, “ he therefore humbly hopes, that if the fact of
 “ exclusive

“ exclusive possession previous to the 1726 he admitted, the
 “ Lord Ordinary will find the same relevant to infer *property* ;
 “ and, if promiscuous possession shall be allowed, that the same
 “ will infer *common pasturage*. He trusts much to the candour of
 “ the gentlemen employed for the defender ; and he is perswa-
 “ ded, if not much misinformed, they will admit the first : But
 “ *should they yield the second* to avoid further expence and trouble,
 “ *he will put up with it*, and either betake himself to the *common pa-*
 “ *sturage* upon this farm, or will accept of the just and equal half
 “ thereof.”

The cause having gone to proof, the same was confined solely to the pendicle of Riebeg, the other spot of Blairnabuiag having been given up, and therefore, scarcely mentioned by any of the witnesses.

With regard to Riebeg, the fact came out precisely as above stated ; that it had been anciently the shealling of Tulloch and Carstormie, and afterwards possessed for a few years by the tenants of Ballachlachan. It is a part of that high ground immediately to the north of Ballachlachan, and of other towns and farms on that side of the river Brane, which is known by the general name of the hill of Blairnabuiag, and as it lies between Ballachlachan and the shealling of Blairnabuiag, the cattle of Ballachlachan had occasion to pass by or near that shealling in going to Blairnabuiag ; and during the time that the shealling of Riebeg was empty, they very naturally stopt and grazed there, in place of going further on to their own shealling of Blairnabuiag.

John Steel, a very old witness, and who has known the grounds from his infancy, depones, That he herded at different times to
 p. 19. l. the tenants in the neighbouring sheallings. Depones, “ That
 “ during this period, he had occasion to see the tenants of Tul-
 “ loch belonging to the estate of Grandtully, viz. James Maniter,
 “ Robert Fleming, and Alexander Duff, and likewise Thomas
 “ Fleming, Alexander Dow, and John Machemish, tenants in
 “ Carstormie, also a part of the estate of Grandtully, their bestial
 “ pasturing upon the shealling of Riebeg ; and that the tenants
 “ of the said towns, had sheall-bothies built thereon, those of Car-
 “ stormie being built on the east, and those of Tulloch on the
 “ west side of the burn of Riebeg. Depones, That about 77 or
 “ 78 years ago, so far as he remembers, the said two towns of
 “ Tulloch

“ Tulloch and Carstormie were inclosed, and have ever since
 “ been called the park of Strathbrane ; and further depones,
 “ That after the said inclosure was made, there was no person
 “ that built sheall-bothies upon the foresaid Riebeg for several
 “ years : That the first he observed do so, was the tenants of
 “ Meikle Trochry who built bothies thereon, and shealled there-
 “ on during two or three weeks in summer, for the space of five
 “ or six years. Depones, That the sheall-bothies of Trochry
 “ were built upon the east-side of the burn of Riebeg : And de-
 “ pones, That during the possession of the Trochry-people as
 “ afore said of the said shealling, there was no other person that
 “ shealled there, so far as he knows.”

The same witness further depones, “ That the tenants of Bal- p. 20. H.
 “ lachlachan likewise, as far back as he remembers, were in use
 “ at all seasons of the year, of pasturing their bestial in common
 “ with the bestial belonging to the tenants in the neighbour-
 “ hood, on the estate of the barony of Strathbrane, westward
 “ from Ballachlachan, without the head-dykes towards Riebeg,
 “ and from thence westward to the afore said shealling near the
 “ burn of Auld-darg, without any interruption; and they always
 “ pastured in this manner their bestial, except when they were
 “ feeding within the head-dykes. And what he has deponed is
 “ truth, *etc.*”

It is needless to recite the depositions of the other witnesses :
 They in general concur, and it is clear in short from the whole
 proof which is in your Lordships hands, that Riebeg was the an-
 cient shealling of Tulloch and Carstormie, that it was only posses-
 sed for a certain time by the people of Ballachlachan : That from
 the year 1726 downwards, the pursuer has acquiesced in the inclo-
 sure which was made of that shealling, and in the exclusive pos-
 session of the defender and his predecessors, which was the con-
 sequence of that inclosure, and that the tenants of Ballachlachan
 have their own particular and separate shealling upon the hill of
 Blairnabuiag, and which is called the shealling of Blairnabuiag.
 It is likewise proved by sundry of the witnesses, particularly by
 John Scrimzeour, p. 22. D. and F; and Walter Stewart, p. 23.
 D. that none of the towns in Strathbrane have more than one
 shealling belonging to them.

As to what is said in the deposition above recited, that the tenants of Ballachlachan pastured their bestial in common with the bestial in the neighbourhood, from Ballachlachan without the head-dykes towards Riebeg, and from thence to their own shealling near the burn of Auld-darg. This is a circumstance which was much taken hold of in the pleading, but, in reality, when enquired into and explained, it turns out to be greatly in favour of the petitioner in the present argument. The same thing is mentioned by some of the other witnesses, and the petitioner has no occasion to controvert the fact. The cattle of Ballachlachan did certainly pasture along the hill in going to and coming from their own shealling; and, when at their own shealling of Blairnabuiag, they naturally pastured for a little space round the huts of the shealling. But, *1mo*, This goes no further than a pasturage, and does not infer a common property. *2do*, Whether pasturage or common property, it goes no further than giving the pursuer a right upon that hill, from his feu north-west-ward over the space where he has thus pastured, in common with the towns in the neighbourhood of him.

Your Lordships, upon looking at the plan, will see that there is a considerable burn or water which runs from Loch-Skeoch on the north-west into the river of Brane on the south, and that the feus of Ballachlachan and Ballinloan, ly to the east of that burn and to the north of the river Brane. Immediately to the north of Ballachlachan, and from that all the way northward to Loch-Skeoch, on the east-side of the said burn or water, bounded on one side by the burn, and on the other by the hills of the Bishoprick of Dunkeld, lies the hill or high ground called Blairnabuiag; and this is the utmost extent of the ground, which the pursuer, for his feu of Ballachlachan and sundry other tenants and possessors of towns in the neighbourhood have exercised their right of pasturage.

P. 15. F. Ann Robertson, one of his own witnesses, depones, “ That the space of ground, which goes under the name of Blairnabuiag, extends from Loch-Skeoch on the north-west, south to the burn of Pittoch, and on the east to the hills of the Bishoprick.

This

This is precisely the fact ; and it is the space of ground here described, bounded on the one side by the burn or water, running from Loch-Skeoch into the river Brane, on the other side by the hills of the Bithopruck, upon which the shealling of Blairnabuiag and some other sheallings stand, and upon which the pursuer and the tenants and possessors of some neighbouring towns have been in use to pasture. And indeed the pursuer's pasturage has been confined to a very small space of that hill as already mentioned, *viz.* to the ground between his property lands and his shealling, over which the cattle naturally pasture, coming and going, and a little space around the shealling.

Such being the fact, the question is, What right falls now to be ascertained to the pursuer ? Your Lordships have found, that he cannot evict from the petitioner those spots of the intermediate ground, consisting of a very few acres, which were inclosed as far back as the 1726, and for which the pursuer can have no manner of occasion, as the remaining pasturage of the hill is much more than sufficient for him ; but your Lordships were desirous to ascertain what sort of right he had in the remaining ground, whether of pasturage or of common property.

Now, in the 1st place, it is humbly submitted to your Lordships, that in the present process there are not *termini habiles* for ascertaining this point, the only conclusions being to evict the two little spots which have been inclosed, and either to find them to be the property of the pursuer, or at least to throw them open as a common pasturage, neither of which your Lordships have thought proper to do, and indeed with regard to one of them, the pursuer himself seemed to pass from his claim by not insisting upon it.

But 2^{dly}, Supposing the conclusions to be proper for ascertaining the point now under consideration, it is, with great submission, thought that the pursuer has established nothing further, than a servitude of pasturage *according to use and wont*. His original feu-right contains the general words used in such cases, of grazings, sheallings, common pasturages, commonities, muirs, parts, pertinents, *etc.* but these general words are explained and limited by what follows, *viz.* “ used and wont, pertaining to the

“ said

“ said lands of Ballachlachan, by all right, meiths and marches
 “ as the same was first occupied and possessed by the tenants and
 “ occupiers thereof.” And in the after-titles made up by the
 pursuer himself, the word commonities is entirely left out. But,
 at any rate, this general clause of style limited and explained in
 the way which has been mentioned, can go no further than the
 possession has gone. The possession, or use and wont, is the cri-
 terion by which it must be judged what sort of right the pursuer
 has. He must either shew what he was possessed of at the date
 of the feu-right, or what he has since been possessed of.

It is not disputed, that the whole of these lands, including the
 pursuer's feu, and whether consisting of hill or low ground are a
 part of the barony of Strathbane, belonging originally to the pe-
 titioner's predecessors, and still belonging to him, unless in so far
 as the pursuer can show that he has acquired a right to them.
 He has shown that he has exercised a right of pasturing his cattle
 upon a certain part of the hill of Blairnabuiag, but as to any thing
 further, he has not shown.

The petitioner cannot therefore, with deference, think that
 the pursuer's right amounts to any thing more than a servitude
 of pasturage on the hill of Blairnabuiag, if not confined to the
 particular space where he has been in use to pasture, at least ex-
 tending no further than the hill known by that name, bounded
 on the west by the water above-mentioned, and on the east by
 the hills of the bishoprick. He has shown no evidence either of
 casting feal and divot, cutting peats, or performing any other
 act whatever of property upon the said hill.

Your Lordships will remember the late question which oc-
 curred about the division of the Mearns muir : Sir Robert Pol-
 lock, whose lands had been a part of the barony of Mearns, and
 were given off with the same general clause of parts, pertinents,
 muirs, mosses, pasturages, &c. was with difficulty admitted to a
 share of the common property of said muir ; and he only at last
 prevailed upon his bringing a very long and full proof of exer-
 cising all acts of common property, not only pasturing cattle
 and sheep, but committing them to the charge of the muir-
 herds, and paying part of their fee, casting feal, peats, divot,
 cutting star, bent, rashes, &c. upon the commonity. At the
 same

same time, certain other farms adjacent to the muir, belonging to different proprietors; with parts and pertinents, *viz.* Bannochbank, Langron, Floak, Cairn, &c. were only found to have a servitude of pasturage, because they had performed no other acts but that of pasturing so many founs of cattle and sheep upon the muir.

3dly, Even if your Lordships were still to continue of opinion that the pursuer's right amounts to a common property, and not merely to a servitude of pasturage; the interlocutor certainly falls to be varied and explained, so as to limit him in this right of common property, to the particular hill or high ground where the right has been exercised. This hill is indeed pretty extensive, it reaches about three miles from north to south, and about a mile and a half from east to west; but the interlocutor, as it stands, might give him a handle to maintain, that the whole extensive range of hills on the west side of the fore said water, reaching westward for several miles, are comprehended under the name of common. Nay, he may also possibly contend, that his right of commonty reaches across the river Brane, to that part of the barony which lies to the south of it; for this barony of Strathblane lies on both sides of the river, and there are extensive hills on both sides, on which hills there are sheallings; but surely it was not the intention of the Court to extend the pursuer's right to all the hills and muirs of the barony, however disjoined from him, and tho' he has had no connection whatever with any hill or ground, which can come under the notion of a commonty, except the space above-mentioned, called the hill of Blairnabuiag, in as far as his pasture extended therein.

Lastly, as his summons concludes for evicting from the petitioner the little spot of inclosed ground called the farm of Blairnabuiag, as well as Riebeg, tho' he afterwards passed from any right to the former, by not insisting in it. Th petitioner falls of course to be assolizied from this conclusion ^eof the process, which has not yet been done by any of the interlocutors pronounced.

May

May it therefore please your Lordships, to alter your last interlocutor,
And either 1mo, To find that the parties are not in a proper action
for ascertaining, Whether the pursuer's right in the hill adjacent
to his feu, is a right of property, or tonly a servitude of pastu-
rage : Or 2do, If this shall be thought a proper action for that
purpose, to find, that he has no more than a servitude of pas-
turing the cattle belonging to his feu of Ballachlachan on the hill
called Blairnabuiag, in the summer time, in common with Sir
John Stewart's tenants and possessors of the several towns and
possessions, in the neighbourhood of said hill, and who have been
in use to send their cattle thither ; and in case of any difficul-
ty on this head upon the proof as it stands, to allow the parties
a further proof : At least, 3tio, To limit his right, whether
of common property or servitude, to the said hill of Blairnabuiag,
and not to extend it over the whole high grounds of Strath-
brane. And lastly, To assoilzie from the conclusion, with re-
spect to the little inclosure called Blairnabuiag.

According to Justice, &c.

ILAY CAMPBELL.

December 8. 1768.

John Stewart
A N S W E R S *11*

F O R

ARCHIBALD MACDUFF of Ballinloan,

T O

The PETITION of Sir John Stewart of
Grandtully, Baronet.

THE petition under your Lordships consideration, endeavours to support four different propositions: That the process in which your Lordships have pronounced judgement, is not a proper one for ascertaining the respondent's right; That it is only a right of servitude; That it falls to be limited to a certain space, which the petitioners call *Blairnabuiag*; and, That they fall to be altogether assailable as to any conclusion with respect to a little inclosure called *Blairnabuiag*, confessedly upon the above-mentioned space of that name.

The two last of these propositions, the respondent must be pardoned for observing, in passing, are not very consistent with one another, and the last of them seems to be intended more with a view to perplex and harass the respondent, than from any intention to throw light on the cause.

The respondent does not mean to complain of what is not properly before the court; but he cannot help feeling the disagreeableness of his situation, and expressing what he feels.

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A small proprietor compared with his more powerful antagonists, he has of late been harassed, not only with private incroachment, but with judicial proceeding. The farms of Blairnabuiag and Reebeg, as they are called, have, within these fifty years past, been taken off a subject, by the petitioner's own argument confessedly common, and appropriated to himself, without order of law, right, or shadow of title to such exclusive property. They were the very best spots in this hill ; and, without further culture or improvement than tillage, sow near sixty bolls between them, besides ley, and exclusive pasture, which they comprehend.

This was an incroachment of some consequence, which the petitioner had only opposed by instrument of interruption as to one, and the remonstrances of Mr Menzies of Culdares. Yet, notwithstanding this passive obedience upon his part, the respondent had the mortification to be prosecuted, and found liable in damages before the sheriff of Perth, for taking a few stones from the petitioner's ground, to help his mill-dam, although it was proved, that double the quantity, the pursuer's property, had been formerly taken to build a factor's house with.

In the present process, the petitioners have been allowed to continue these obvious incroachments *in re communi*, attended with the utmost inconvenience to the respondent, and he has acquiesced without murmuring ; but it seems he is to receive no quarter on the other side.

He is considered, and indeed represented to your Lordships, as an inconsiderable feuer, whose property is of no consequence, compared with that of his more powerful antagonists, consisting of towns, farms, villages, &c. and who are said to possess thirty times more land than him ; and the glaring injustice to be done the petitioner is represented in strong colours, as arising from an over-valuation of the respondent's lands, being more than a fifth of the petitioner's.

The

The respondent has no intention to inquire into the value of the petitioner's estate, though he believes the comparative extent of it is greatly exaggerated: what sort of towns, villages, &c. may be within his dominions, is submitted, with this observation, That some of them have but half-ploughs and quarter-ploughs of land annexed to them; and no less than ten ploughs of land are let in this neighbourhood for 100 merks yearly rent.

Neither has the respondent any vanity for family; nor does he think, before your Lordships, whatever may take place in other parts of the country, the name of *feuer* will be attended with any disgrace: but he must be pardoned for observing, that his ancestors have possessed their small property of Ballinloan as long as the family of Grandtully have done their more extensive estate. They were industrious as well as ancient: Their possession being small, was easily, and consequently might be early improved. Perhaps, too, they had vanity to court a high valuation: And thence arises the fact so much founded on in the petition, and which has drawn the respondent into this digression, *viz.* That the lands of Ballinloan are valued at L. 200; for there is no mention of the mill in the cess-books.

But this inquiry as to the valuation of Ballinloan, and the cause thereof, or the extent of its territory, is altogether a digression, and merely intended to persuade your Lordships, that great injustice will be done the petitioner, in a division upon the footing of the interlocutor, as it stands; for your Lordships will observe, that there is not one word contained in the summons, or decided by the interlocutor, concerning the respondent's valuation of Ballinloan, or the rights consequential thereto; so that any argument which is merely derived from expediency, as to it, flies entirely off. The late purchase of Ballachlachan, and the valued rent of it, is the only thing that could be objected to in this process; and the court will take particular notice as to that, that it is only

£30 of valued rent, although, upon a survey, it is found to consist of sixty-six acres of well-improved arable land, besides ley, meadow, and other pasture ground; and surely this cannot be reckoned a high valuation in any part of the country; or, if it is so, the petitioner has his predecessors to blame, whose property it probably was at the time of this valuation.

It may indeed be true, that upon a division the lands of Ballinloan, which have likewise enjoyed a common pasturage, and casting of seal and divot, &c. *pro indiviso*, upon the commonty of Strathbran, may be intitled to a property effeiring to the valued rent. But this is not the question presently before the court; that solely relates to the lands of Ballachlachan; and therefore your Lordships cannot take into your view any consequences drawn from the situation of Ballinloan.

The respondent, having thus endeavoured to remove some observations in the petition, which he apprehends are altogether extraneous to the issue, shall now endeavour to consider those conclusions of it to which the argument ought more properly to have been confined. And,

First, As to the nature of the process, the respondent cannot conceive upon what grounds it can be maintained, that in an action of declarator of property, your Lordships could not find he is intitled to a common property. The greater certainly includes the lesser. Property includes common property.

It may indeed be true, that in the course of the proceedings the respondent did apprehend, that on account he and his predecessors had built and possessed huts, called *shealings*, upon certain parts of the commonty of Strathbran, he was intitled to the exclusive property of these spots; and therefore that upon the footing of the interdict *unde vi*, your Lordships would order the incroachments which had been made upon these particular spots to be thrown open. But as to the grafings, which are likewise mentioned in the summons,

mons, from the nature of them it was obvious that they must have been common property.

And indeed, even as to the shealings, to avoid expence, he offered either to take the half of the farms inclosed; which shews, by the by, he contended that he had at least a right of common property therein; or if the dike should be thrown down, to betake himself to the common pasturage thereon, *pro indiviso*; which is so far from being inconsistent with a right of common property, that it is the very ground upon which such right falls to be declared.

Neither of these offers were accepted of; so the matter went to proof, and the respondent proved clearly by one positive witness, *viz.* Donald Macintosh, That so far back as the year 1699, the tenants of Ballachlachan enjoyed the exclusive possession of Riebeg. This witness was born in the 1693, and depones, "That he remembers of the tenants of Ballachlachan, when he the deponent was about six years of age, having their sheal bothies at Riebeg, and that none else had bothies there; and that these bothies stood upon the east of the burn of Riebeg. Depones, That when he was about ten or twelve years of age, the tenants of Meikle Trochry came and shealed also at Riebeg; where they continued shealing for about two years, and afterwards left the same: That their sheal-bothies stood upon the west side of the burn of Riebeg. Depones, That after this the tenants of Ballachlachan continued to sheal at Riebeg till the deponent left that country; and that his father's bestial always shealed there, he being a tenant in Ballachlachan."

This positive testimony as to the possessions of Ballachlachan being previous to that of Trochry, is not properly contradicted by any other, but quite consistent with them. It is true one witness of no great fame, John Steel, depones likewise to its being the shealing of Tullich and Carstorny; and there is a hearsay evidence that it was so; which, joined

to the promiscuous possession after that, it may be acknowledged was a sufficient ground for your Lordships judgment, finding, That the respondent had no more than a right of common property, even in the shealing. And there can be no doubt that your Lordships could do so, both as to it, and the grazing upon the common of Strabrane, consistent with the conclusions of the summons, and the after proceedings. For the respondent, aware of promiscuous possession in subjects of this kind, had prayed the Lord Ordinary to find it relevant to prefer common pasturage; that is, while it remained undivided; and which must necessarily infer a right of common property upon a division.

So the petitioner seems to have understood the respondent's meaning in the following passages in the answers to the condescendence, and his memorial; and, indeed, it was impossible to mistake the respondent, after demanding the half of the farm, which he had no right to do, upon the footing of a servitude.

p. 8. F.

In the first of these papers, says the petitioners, "The question presently depending betwixt Mr. Macduff of Ballinloan and Sir John Stewart of Grandtully, being, How far the former has a right of exclusive property; at least of *common property*, along with the defender, in two shealings, lying in the *hill* of *Strathbran*, Riebeg, and Blairnabuiag?"

p. 2.

And in the memorial he says, "Which conclusion, in the course of the process, the pursuer afterwards restricted to that of having only *a right of common property*," &c.

But a very good answer to the whole of this argument arises from your Lordships interlocutor of the 14th of July, which is now final; for as your Lordships thereby appointed memorials to be given in upon the question, Whether the pursuer was to have a right of common property, or of servitude, upon the division? your Lordships undoubtedly thereby decided the relevancy of determining that question

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in this process: and in doing so, your Lordships proceeded *optima fide*, upon the petitioner's above admissions; and the judgement being now final, cannot be altered.

The *second* point, Whether the respondent is intitled to a right of common property, or of servitude? is indeed so far open to the petitioners, that your Lordships might yet find he had not a right of common property. But as from what is above said under the preceding article, it must be obvious to the court, he never meant to limit his right to a right of servitude only, he shall not repeat what is already observed in answer to the criticisms upon the words of the condescendence; which, though strictly taken, imply no such limitation. And it is obvious from the whole taken together, it was never dreamed of, till this petition was presented.

As to the argument in law upon this head, it was already deliberately determined by the court, upon memorials on the point; and the judgement was but the other week repeated, in the question betwixt his Grace the Duke of Hamilton against certain feuers, in the process of the division of the muirs of Reddingrig and Whitesiderig.

It was there well observed, that feuers must be supposed to enjoy what they possess, as part and pertinent of their feu *tanquam optimum maximum*; and that the finding the possession in consequence of such title would infer only a right of servitude, would unhinge the whole divisions that had proceeded before this court.

The respondent shall only add, that it might likewise pull up all those divisions which have proceeded by arbitration; at least he believes there are none in which the above rule has not been observed; which, as it shows the sense of the country, proceeding upon the faith of your Lordships former judgements, he is in no apprehension the law will be altered in this particular case.

With regard to what is alledged in point of fact, the respondent, if denied, shall be able to prove, That he has cast
peats,

peats, cut turf, and pulled bent, heather, and rushes, upon this common, time immemorial.

As to the *third* conclusion of the petition, in which it is prayed "to limit the petitioner's right, whether of common property or servitude, to the hill of Blairnabuiag, and not to extend it over the whole high grounds of Strathbran:"

The respondent must, in the *first* place, observe, That there is properly no such hill as Blairnabuiag, as appears from the etymology of the word; *blair* signifying, in the Irish language, a plain in the middle of a hill, and *buiag*, a daisy: so that it is properly a spot upon a hill in which daisies grow; and might be the name of a stance for a shealing; as Riebeg, which signifies the *little shealing*, is the name of another; but none of them are names of hills. The hills upon which the respondent's cattle have been in use to graze, are called the *hills of Strathbran*; and so the petitioner calls them in a passage above referred to; and these, he shall now proceed to show, from the nature and situation of his and the adjoining property, as well as the proof adduced, have been possessed in common, *pro indiviso*, by the whole tenants and proprietors upon the side of the Bran, and perhaps too by the tenants of the Bishoprick, who, it is believed, though they do not appear in this process, have not relinquished their claim of common upon these very hills which the petitioner pretends belong exclusively to his tenants and feuers in the barony of Strathbran.

As to the nature of the property along the sides of the Bran, your Lordships had occasion to be informed, in the course of the pleadings, that they are in part arable, and in part pasture farms, lying along the side of that river. The arable land is indeed inconsiderable compared with the pasture, producing only for the most part as much grain as is sufficient to maintain their families, and fodder such cattle as they keep upon their farms in winter. Their chief riches and wealth consist in cattle; and without summer and winter

grasings

grasings to them, as they respectively require; their farms are altogether useless.

Their cattle consist partly of milk-cows, horses for the use of the farm, and horses and cows, which, being fit for sale, they keep upon their farm in winter and spring, and which in summer they feed upon the grasings in the commonty.

But besides these, they have numbers of what are called hill-horses, yeld cattle, and goats, which are allowed to run the whole winter without the head dikes or boundaries of the farms through the whole commonty-grounds, all along the head-dikes of Strathbran, and from thence to those of the Bishoprick and Grandtully; so that however they may be kept off the respective head-dikes by the tenants, it is in the nature of things impossible to circumscribe them upon what is properly commonty, by any boundaries whatever, far less by small stripes of water or ideal lines. And the only distinction that can take place is, that a tract of hills and land is considered as the commonty of one country, not of a few particular farms in a country, and another tract of land is held to be the common and promiscuous property of a different set of tenants and feuers in a different country.

With regard even to the cattle which in summer pasture along the commonty to the shealings, and for the conveniency of milking, and taking care of which, shealings are erected, it is obvious from the proof, that these shealings are at different times occupied by the tenants of different farms, who change their situation according to their convenience or caprice. Their materials are but of mud; and in short, from their nature, they differ but little from the tents or temporary erections of the wandering Arabs, whose property and way of life seems very nearly to resemble that of the inhabitants of the shealings: so that it is in vain to say, that possessing a shealing upon this or that place, limits the property in a common; for it is certain, that not only are their situation changed, but that the cattle pasture many miles round them; and tho'

the huts are situated at some distance from one another, the cattle pasture all promiscuously without confinement of burn or boundary. So that here is evidence *ex rei ipsius natura*, that not only as to the hill-cattle, but even as to those grazed in summer, the right cannot be limited to a particular hill: and it is apprehended, that as it seemed to be the opinion of the court at advising this cause, that the possessing a shealing could give no right of exclusive property; so it would be contradictory thereto, now to find that any temporary possession thereof, contrary to the nature of the thing, should infer a limitation of the right upon what is evidently the commonty of a whole barony. However hard the consequences may be, and there will be none such in the present case, the valuation of Ballachlachan amounting to but L. 30 Scots, the division of this commonty must be governed by the same general rules that have hitherto taken place in that of other commonties.

After having said so much, which seems to carry demonstration with it from the nature of the thing, that no limitation can be here made, and no distinction betwixt this and other commonties, the respondent shall content himself with reciting one or two of the witnesses who have deposed to this promiscuous possession.

- State, p. 16. E, F. The first is Thomas Gow, aged 70, who depones, "That the tenants of Strathbran pasture their bestial promiscuously without their head-dikes, from *one end of the country to the other*; and that they have done so ever since the deponent was a herd, as before mentioned." Donald Macintosh, aged 74, depones, "That if the cattle had gone over to the hills of Grandtully, or other hills in the neighbourhood, no person would have stopped them, *the pasture above the head-dikes being promiscuous to the whole tenants in Strathbran.*" John Scrymgeor, aged 64, depones, "That during the foresaid period that the tenants of Ballachlachan shealed at Riebeg, the tenants in the neighbourhood pastured
- p. 17. G, H. "to the hills of Grandtully, or other hills in the neighbourhood, no person would have stopped them, *the pasture above the head-dikes being promiscuous to the whole tenants in Strathbran.*"
- p. 22. B, C. "during the foresaid period that the tenants of Ballachlachan shealed at Riebeg, the tenants in the neighbourhood pastured

“ stured their bestial upon the grounds of Riebeg promiscuouf-
 “ ly with theirs, and the tenants of Ballachlachan’s bestial
 “ also pastured promiscuouf-ly with those of the neighbours
 “ upon their shealings.” Walter Stewart, aged 79, depones, State, p. 23. A,
 “ That during the time the Trochry tenants possessed the said ^{B.}
 “ shealing, the people of Ballachlachan pastured their bestial
 “ promiscuouf-ly upon the grounds thereof with theirs; and
 “ that when the Ballachlachan tenants possessed it, the bestial
 “ belonging to the tenants in the neighbourhood likewise
 “ pastured promiscuouf-ly with theirs on said shealing, and
 “ the Ballachlachan bestial again pastured upon their sheal-
 “ ings.” Anne Robertson, aged 82, depones, “ That she — p. 15. I,
 “ never heard that Riebeg was the shealing of any particu- & 16. A.
 “ lar town in the neighbourhood, either of Carstormy, or
 “ Tullich, or Ballachlachan, but that the tenants of Ballachla-
 “ chan pastured their bestial thereon along with those of their
 “ neighbours.”

The respondent is hopeful your Lordships will be satisfied
 with the evidence above stated. The nature of additional
 proofs, in questions of this kind, are too well known to the
 court to be rashly indulged. He has from the beginning
 anxiously avoided every proof, though it has in the event
 turned out in his favour. He made every concession in his
 power. He is sorry he can make none as to this article, con-
 sistent with the idea of his right, and almost existence of his
 property: And he hopes your Lordships justice, after a proof
 has been concluded, and the cause advised, will not involve
 him in a new litigation, which must prove ruinous to his
 slender circumstances.

The respondent is somewhat at a loss to comprehend the
 intention of the last prayer in the petition, to be affoizied
 from the conclusion with respect to Blairnabuiag. He has
 not indeed strenuously insisted to have the mud-walls of this
 incroachment turned down, though it was made equally
 sine

sine titulo as that of Riebeg, and is as hurtful and destructive to the pasturage upon that part of the commonty where it lies. He was aware, that the argument with regard to it, as there was no legal interruption within the years of prescription, would be stronger than with regard to Riebeg: and provided he got the mud-dikes of Riebeg turned down, he declared himself little anxious with regard to it. But altho', if the respondent may be allowed the expression, it is one of that chain of forts which the family of Grandtully have had some time in view to erect upon this commonty, and thereby to incroach upon it, the respondent never meant to give up his right thereto, or to insist that it should be allocated to the petitioner as a part of his proportion therein upon a division.

It is evident that it falls to be ruled by the same principles upon which your Lordships gave judgement with regard to Riebeg; and that it must remain in the exclusive possession of Sir John till such division is made, and be then adjudged to him as a part of his share. So that he cannot with any propriety, consistent with that judgement, be assailed from the conclusions with regard to it: And though nothing is mentioned in the interlocutor concerning it, his interest is in no shape thereby hurt. So that the respondent hopes, upon the whole, your Lordships will have no difficulty to refuse the desire of the petition, and adhere to your former interlocutor.

In respect whereof, &c.

ALEX. MURRAY.

Law

Eng

P9634

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[Process of Archibald Macquar of Ballin-
loan against Sir John Stewart of Grandtully.]

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